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[fol. 2] IN THE CIRCUIT COURT OF JACKSON COUNTY,
MISSOURI, AT KANSAS CITY

No. 641467

BENJAMIN OWENS, JR., Plaintiff,

VS.

MANUEL VACA, CALIB MOONEY, and
ERNEST F. KOBEIT, Defendants.

J. DONALD MURPHY, Judge, Division No. Eleven.

PETITION FOR DAMAGES—Filed February 13, 1962
(as amended)

1. Plaintiff states that each of the Defendants, at all times herein mentioned occupied the positions and the status mentioned above, which is incorporated herein; that the National Brotherhood of Packing House Workers is a voluntary Association and labor union; that each of the Defendants is a class representative of the organizations named above, and the above parties are class representatives of the above voluntary associations and all are members of the above associations which are voluntary associations and labor unions; that the local branch of said National Brotherhood of Packing House Workers is known as Kansas City Local #12; that the members of said labor unions constitute a class and are very numerous, and that it is impractical to bring them all before the Court; and that the above parties are the only parties known to Plaintiff upon whom service may be had in the State of Missouri; that service upon said Defendants will fairly insure adequate representation of all, and on behalf of all in said union, who are and may be sued; that this is a class action against the membership of said National Brotherhood of Packing House Workers and said Kansas City Local #12,

its local branch; that this action is several and there is a common question of law and facts affecting the several rights of the members of said unions and a common relief [fol. 3] is sought; that said Defendants are the representatives of the local and National membership of all of the union members as to matters occurring in this area, and have been fairly chosen and adequately and fairly represent the whole class as representatives of the class; that Plaintiff is unable to name any other members of said unions upon whom service may be had in this State; that at all times herein mentioned, said union membership and members were acting through their agents, servants and employees in the scope of their employment; that pursuant to a contract between said National Brotherhood of Packing House Workers and Swift & Company, the employer of Plaintiff, covering the period from September 1, 1959 to September 1, 1961, said National Brotherhood of Packing House Workers was designated as the agent for Plaintiff, member of said National Brotherhood and of said Local #12 in matters connected with Plaintiff's employment with said Swift & Company, in Kansas City, Kansas, and particularly in connection with handling of grievances of Plaintiff against said Swift & Company, under Section XIII of said contract; that Defendants have a copy of said master agreement, and are acquainted with the provisions thereof; that said master agreement provided that if an employee, including Plaintiff, and the employer had differences or any local trouble incident to the employment relation, the differences would be handled through the grievance procedure provided in said master agreement, which included [fol. 4] five steps; that the agreement further provided that if the difference was not settled by the fourth step, then the National Union, Defendant herein, may refer the grievance to a named arbitrator for arbitration.

2. For cause of action against Defendants, Plaintiff states that he had a difference with his employer, Swift & Company, under the terms of said master agreement, in that said contract provides in Section III for seniority to employees after an employee has accumulated forty days

of service; that an employee shall have plant seniority after one year's accumulated service; that Plaintiff had fulfilled such requirements for seniority; that said contract further provided that lay-offs from a department occasioned by gang reductions would be made according to department seniority, and that an employee having plant seniority who is removed from his department by gang reduction shall have the right to displace the junior employee in the plant provided he is qualified to perform such job, or can learn it within a reasonable time, or that such person with seniority shall have the right to displace a junior employee in the plant who is performing a job paying the unskilled labor rate; that in the event that it becomes necessary to increase the working force in the original department of such person with seniority, he shall be recalled to his original department according to the department seniority; that if said person with seniority elects to go off the pay roll, [fol. 5] he has the right to be recalled when gangs are increased by calling back employees, according to his seniority; that said contract further provided that if an employee is suspended, laid off out of turn, or discharged without proper cause, he will be returned to his former position and paid for all time lost; that Plaintiff complied with all the provisions of said contract, exhausted all remedies therein permitted him, but that employer breached said contract by wrongfully suspending him, laying him off out of turn, refusing to call him back according to his established seniority as provided in said contract, and wrongfully refused to continue his employment by falsely and wrongfully asserting that he was not physically fit to hold the job; that Plaintiff was physically fit to hold the job, and requested that he be restored to the job, in accordance with said contract, and permitted to work from January 8, 1960 on; that employer failed and refused so to restore him to work, and breached said contract as herein provided; that Plaintiff was earning and was entitled to earn on said job and in said employment the sum of Six Thousand, Five Hundred (\$6,500.00) Dollars per year, plus such increases as were agreed upon from time to time; that, as a direct result of said wrongful breach of said contract, by em-

ployer, and of said wrongful refusal by employer to permit Plaintiff to continue to work, Plaintiff was damaged in the sum of Six Thousand, Five Hundred (\$6,500.00) Dollars [fol. 6] per year, continuing until the date of trial, or, until employer permits Plaintiff again to work under said contract.

3. Plaintiff further states that he requested the Defendants to carry the differences and grievances against the employer through all necessary steps provided by said master agreement, but the Defendants arbitrarily, capriciously and without just or reasonable reason or cause, by refusing without just grounds to pursue further the just claim of Plaintiff, and by demanding, without legal basis, the \$300.00 to continue, all as herein stated, refused to carry his grievances through the fifth step, arbitrarily, wrongfully, capriciously, wantonly and with legal malice, as aforesaid, demanding approximately Three Hundred (\$300.00) Dollars from him before taking said step, and refusing to take said step; that thereby said Defendants acted wrongfully, illegally, wantonly, arbitrarily and with legal malice, as aforesaid, preventing Plaintiff from completely exhausting administrative remedies permitted in said master agreement, causing him actual damage in the sum of Six Thousand Five Hundred (\$6,500.00) Dollars per year from the above date of January 8, 1960 and continuing until the date of trial, and he is further entitled to punitive damages in the sum of Three Thousand (\$3,000.00) Dollars; that Defendants, as a voluntary association and labor union and an association of large means are amply able to respond [fol. 7] in punitive damages; that Plaintiff has requested that Defendants pursue his grievances under said master agreement but that Defendants have failed and refused to do so, following the fourth step.

Wherefore, Plaintiff prays judgment against Defendants in the sum of Seven Thousand (\$7,000.00) Dollars, actual damages and Three Thousand (\$3,000.00) Dollars, punitive damages, and for his costs.

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
DEFENDANTS' FIRST AMENDED ANSWER—Filed June 5, 1964

Come now the defendants, and each of them, with leave of court first obtained, and make the following first amended answer to plaintiff's first amended petition:

1. That said petition has failed to state facts or a cause of action upon which relief may be granted.
2. That for further answer and defense, that said petition fails to state facts or a cause of action upon which relief may be granted for the reason that there is a lack of jurisdiction of this court over the subject matter of the alleged cause of action pending because the gravamen of plaintiff's first amended petition is arguably and basically an alleged unfair labor practice under the Labor Management Relations Act, as amended, 29 U.S.C., Section 151, [fol. 8] et seq., and especially 29 U.S.C., Section 158, (b) (1) (A), and that as a direct consequence thereof the jurisdiction of the courts of this over the subject matter of this cause is pre-empted and prohibited, and that the exclusive, primary jurisdiction over this cause is properly vested in the National Labor Relations Board.
3. That for further answer and defense, that said petition fails to state facts or a cause of action upon which relief can be granted, for the reasons that there is no sufficient allegation, averment, or showing that the defendants were under any duty to further prosecute the grievance of plaintiff, and that there is no sufficient allegation, averment, or showing that defendants exercised bad faith in refusing to so process the grievance.
4. That for further answer and defense, that plaintiff's first amended petition for damages on its face clearly shows that the alleged wrongful action on the part of the defendants herein arose on January 8, 1960, and that plaintiff's first petition was filed on February 13, 1962, which was more than two years subsequent, and as a consequence thereof is barred by the two year statute of limitations of

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the State of Kansas, wherein this cause of action arose, under the provisions of Kansas G. S. 1949, 60-306, 3rd clause.

5. That for further answer and defense that the grievance procedure referred to in plaintiff's first amended [fol. 9] petition is that established by the Section XIII, of the Master Agreement between the employer (Swift and Company) and the union (National Brotherhood of Packing House Workers), which covered the period of September 1, 1959, to September 1, 1961; that under the aforesaid agreement that grievance proceedings in accordance with said agreement were commenced and that the fourth step of said procedure was initiated on November 16, 1960, and thereafter completed on May 9, 1964; that under said grievance procedure that there is a fifth step to be completed in the handling of grievances, namely the referral of said grievance by the union to a named individual as arbitrator; plaintiff herein refuses to proceed any further with the same; and that as a consequence thereof that plaintiff has failed to exhaust his internal and contractual remedies and that this suit is therefore prohibited and barred and that this court does not have jurisdiction over the subject matter of the alleged cause of action herein.

6. That defendants, and each of them, generally and specifically deny each and every allegation, averment and statement contained in paragraphs 1, 2, and 3, of plaintiff's first amended petition herein.

WHEREFORE, defendants, and each of them, having fully answered pray that judgment be entered in favor of them and that they be discharged; that they recover their costs of suit herein incurred and expended; and for all other such [fol. 10] relief as the court may deem meet and proper in the premises.

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
REPLY TO FIRST AMENDED ANSWER—Filed June 10, 1964

Comes now Plaintiff and for Reply to Defendants' First Amended Answer, denies such allegation therein not admitted or averred in Plaintiff's Petition.

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

TRANSCRIPT OF TRIAL—June 18, 1964

This cause came on for trial before the Honorable J. Donald Murphy, Judge of Division No. Eleven of the Circuit Court of Jackson County, Missouri, at Kansas City, and a jury.

APPEARANCES

The Plaintiff was present in person and represented by counsel, Mr. Allan B. Browne.

The Defendants were represented by counsel, Mr. Henry A. Panethiere.

[fol. 11] PLAINTIFF'S EVIDENCE

GUY CAMPBELL was duly sworn.

Direct examination.

By Mr. Browne:

Q. Give your name and address.

A. My name is Guy Campbell. I live at 632 Georgia, Kansas City, Kansas.

Q. What line of business or occupation do you follow?

A. I'm a cement finisher and I do small contract work, [fol. 12] sidewalks, garages, and things like that, but I don't keep steady all time.

Q. You do it for yourself, do you?

A. Yes.

Q. I will ask you if you are acquainted with and have been acquainted with Benjamin or Benny Owens during the last number of years?

A. Yes, sir. He was my next door neighbor when they lived in Armourdale before the flood.

Q. Before Armourdale was flooded out?

A. Yes, sir.

Q. About how many years have you known Benny Owens?

A. Oh, about twenty years.

Q. Now, let me ask you if you recall then the time that he worked, the years that he worked down at Swift's?

A. I do.

Q. And then do you remember about January, February, around in there, of 1960 when he was off for a while from Swift's?

A. I do.

Q. Then do you remember the time since that time?

A. I do.

[fol. 13]. By Mr. Browne:

Q. What, if anything, you had noticed about his condition as to whether or not he was a strong man or otherwise?

A. Well, I noticed that he—once we built a garage, it came a rain and it caved in and we had to dig it out, and he did all the work.

Q. What kind of work was it?

A. Dirt moving, dirt and stone—I mean blocks and rock and everything that fell in.

Q. And what kind of earth moving did he do? Was it by hand or by machinery?

A. By hand. By hand.

Q. With what kind of an instrument?

A. Shovels and picks. That's what he did. He did all the excavating.

Q. Excavating?

A. Yes, sir.

Q. The digging?

A. Yes, sir.
Q. What did he do? Just tell the jury. You were there and they weren't.

A. He mixed mortar for me and he brought all the materials to me and I laid the blocks but he did all of the excavating and like that.

[fol. 14] Q. Was this—just tell whether or not this was light work or heavy work.

A. It's heavy work. That's as heavy as you get on construction.

Q. How many hours on the average would he be working doing that work and other work that you have seen him do, and I am referring to heavy work.

A. Nine and ten hours, sometimes he worked twelve hours.

Q. A day?

A. Yes.

Q. Just state to the jury what you observed as to whether he was able to handle that heavy work over the period that you are telling about.

A. He was able so far as I was concerned. He did a normal day's work as any average man would.

Q. Now during all of this period since the times that we have mentioned in 1960 up to the present time what have you observed about what Benny Owens does in the way of heavy work, if anything?

A. I haven't observed any weakness or anything, he's always give me a normal day's work, you know, a day's work, a full, you know, average day's work, just like any other man; I have hired a lot of them and fired a lot of them any time they didn't work, but he's always worked out.

Q. And what kind of work is the only kind of work you used him for?

[fol. 15] A. Oh, concrete work and all—and block work. I don't do too much brick, mostly heavy work.

Q. Did you know Mr. Benny—you said you knew Mr. Benny Owens before this time in January, 1960?

A. Yes, sir.

Q. And I mean during the time he worked for Swift's, did you know him?

A. Yes, sir.

Q. What kind of work did you—have you noticed, or what have you noticed about his condition during that time, if anything?

A. Well, he was ill at one time and in the hospital but it wasn't too long before—he went to the doctor and everything. See, I followed him, I used him off and on when he lived on Nebraska Street and I remember when he was able to return to work. And after that he was a strong man, as strong as I was.

Q. What is your age?

A. Forty-six.

Mr. Browne: That's all that I think of to ask you.

[fol. 21] BENJAMIN OWENS, JR. was duly sworn.

Direct examination.

By Mr. Browne:

Q. Your name and address?

A. Benjamin Owens, Jr., 2728 North Seventh Street, Kansas City, Kansas.

Q. Now, you are the plaintiff in this case, are you?

A. That's right.

Q. I will ask you if in January of 1960 you were in the employ of Swift and Company for many years before that time?

A. Yes, sir.

Q. How many years have you worked for them?

A. 16 years.

Q. That is up to January, 1960?

A. Yes.

Q. All right.

A. Yes, in the neighborhood.

Q. Before I forget it, what is your age? How old are you?

A. Fifty-one.

Q. What kind of work did you do for Swift and Company over the years?

A. Well, I done all labor work for them. I was hanging chuck, beef chuck and beef loins, half of the beef, and getting the cattle out of the woods.

Q. Out of the—getting the cattle out of the what?

A. Out of the cooler.

Q. Cooler?

A. We call it the woods down there.

[fol. 22] Q. All right. That's all right. I am not familiar with it.

A. And my job was a two-man and we have to take a whole half a cattle, whole half of cattle and we threw it from one rail to the other one.

Q. Two men would do that, or one man?

A. Two men, one man was handling the pole and the other man was under the beef.

Q. Well, I feel certain the jury is familiar with the general operation so I won't go into detail about that, but this work that you did over this sixteen years time, so it won't be strung out any longer than we need go, was that light work or was it heavy work? Just describe it for the jury.

A. It was heavy work.

Q. And how heavy weights would you have to lift all day long in your work during all those years?

A. All the way from, well, the half a cow deal, it run all the way from nine hundred back down to about five, five or—no—a half a cattle—about four-fifty, that's a half a cattle.

Q. Well, of course, you yourself couldn't lift the nine hundred pounds or even four-fifty cow?

A. No, it would be two of us.

Q. Two of you could manhandle that?

A. That's right.

Q. Well how would you do it? What was the job?

[fol. 23] A. Well we had a pole, one man had a pole with a rail up so high, just high enough where the cattle won't drag the ground, you have an idea just how high cattle is,

you know, after you hang the cattle up by his hind legs, it would be somewhere approximately about nine feet.

Q. In the air?

A. In the air.

Q. All right.

A. And, of course, just put the neck, you know, of it down about a foot from the floor.

Q. So it doesn't drag?

A. So it doesn't drag.

Q. Then is it a moveable assembly line or chain or something?

A. Yes, sir. It is on the rail, you can push it on the rail, carry it any place that you want to carry it.

Q. All right. Now exactly what would you or your buddy, whoever it happened to be would help you, do?

A. Well, the cattle that they choose which they want to sell, they will tag it, they will put a tag on it. Then me and my partner, we would go through there and we would find this here tag where we would have to get this here cattle out of there, then that's where we would take our pole and put it on the middle rail.

Q. The middle rail?

A. That's right.

Q. I get it.

A. To where we could make a switch, and we sometimes, sometimes we would handle two hundred, some days three hundred and some days it have run up as high as five [fol. 24] hundred.

Q. Carcasses, you are talking about, pieces of cattle?

A. That's right.

Q. All right.

A. We didn't have to lug all of these out now because sometimes we could make switches, we could make switches and we'd switch them out instead of, you know,—but when we couldn't make that switch then that's when we would have to lug them out of there, that's what you call lugging them out of there.

Q. By elbow grease?

A. That's right, and the pole, one man on the pole and the other man hugging that beef.

Q. Would you let it drag on the ground? A. [fol. 25] No, sir, it can't touch the ground.

Q. For hygienic—they wouldn't pass inspection? A. No. If it touched the ground, maybe fall or something

like that, if the inspector would catch it, he will come along and tag it and we would have to clean it up.

Q. Now that kind of work that you have described to this jury, did you do that for all these years?

A. Well, I didn't, I wasn't on the same job at all times but everything they put me on it was still, you know, it runs just something along just about the same, handling heavy beef; sometimes it was cut up in quarters and sometimes it wasn't.

[fol. 25] Q. You mentioned the word chuck. What do you mean by chuck?

A. Well, we separate the chuck from the—

Q. What do you mean by chuck?

A. The chuck roast comes off of the chuck.

Q. Where is that?

A. It is the neck part of the animal.

Q. The neck?

A. It is the neck part of the animal, neck and part of the back, then it runs into the rib.

Q. Now during the time just before January, 1960, I mean just before this difficulty came up that we are about to go into, what was the work you were doing then for Swift and Company?

A. At the time, 1960, I was hanging chucks then, I wasn't in the woods, I was hanging chucks.

Q. How did that operation take place? What did you do?

A. Well, that was just a plain chuck, it was separated at that time in four different pieces, the chuck, the rib and the loin and the hind quarter, made four different pieces out of it.

Q. And what would you do?

A. I'd rope them and I'd hang trolleys on the, we call them trollies.

Q. You did what, trolley—

A. Trollies.

Q. Put them on the trolley? You did what?

[fol. 26] A. Take the trolley and put them on the rail and this here trolley would roll, it would roll.

Q. Roll?

A. Yes.

Q. Now what kind of lifting, that is involving what approximate weight was involved? How much would you have to lift?

A. A chuck would run all the way from, it run all the way from forty to seventy-five pounds.

Q. Did you have a helper doing that lifting or was that on your own?

A. No helper there, that's one man's work.

Q. During these years before January of 1960 when you did the work you have told the jury about were you able to handle the job?

A. Yes, sir, I was able to handle it, didn't have a minute's trouble.

Q. From your, the very day you were born you had some kind of difficulty, did you? What was that?

A. Yes, along about, about January—about May the 23d, 1959 I had been working long hours, we would work all the way from eight to ten.

Q. No, I will get to that in a minute, but what I wanted to ask you first was about some murmur or something that you had had from birth. If you had that, tell the jury about that.

A. Yes. I am a high blood pressure patient, me and the [fol. 27] whole family, I was born with it, no help for it, no more than just have to take it easy, take care of myself, that's all. All of my folks, my mother and three brothers, two sisters, all of them died at a nice old age with high blood pressure, which I am suffering with today. The doctors found, they said that all they could find—

Mr. Panethiere: Your Honor, I am going to object to any hearsay testimony.

The Court: Sustained. That is not responsive.

By Mr. Browne:

Q. Now you say that your people had had this same thing and yet they lived to a ripe old age?

A. That's right.

Q. Did they work hard too?

A. They worked hard too, probably harder than I did.

Q. And in these sixteen years at least that you have told about before January, 1960, working for Swift, doing that heavy work, notwithstanding that you had this congenital or born with heart murmur, were you able to handle the job?

A. Yes, sir, and all the other jobs I ever been on.

Q. Before that time, even?

A. That's right.

Q. All right. And were you a strong person or a weak person? I mean physically were you strong or weak?

A. I was a strong person.

Q. Before January of '60 your weight got up to about what?

[fol. 28] A. At one time I went up to 230 pounds.

Q. And you are about how tall, just to get it in the record.

A. Five feet and eight inches.

Q. Right now you weigh about how much?

A. I goes to just about 180 pounds now.

Q. Did you reduce your weight on purpose? You know what I mean, by diet, pills, or something?

A. On diet, the doctor told me that was my whole trouble, he said I was too fat.

Q. And did you reduce it?

A. I reduced it.

Q. Now you started to mention in 1959, and I went back farther than that; now please tell about that situation or whatever you started to tell the jury.

A. In 1959 about January the 23d—not—beg pardon—May the 23d, 1959, that's when I went out feeling bad, I didn't have no heart attack, I just only just felt bad, I was tired, and with the illness on top of it that just made me feel so bad and so I decided I would go out and take a rest-up, and the first thing that I done I went to the doctor, I went to Dr. Safer, Swift and Company physician.

Mr. Panethiere: Dr. who?

A. Safer, Phillip.

Mr. Browne: Saper, maybe.

By Mr. Browne;

Q. Well, anyway, the company doctor?

A. That's right.

[fol 29] Q. That was in '59. About what hours were you working then?

A. I was working from seven, from seven to three-thirty and on, just all depends how the work come.

Q. Normal hours seven a.m. to three-thirty in the afternoon?

A. That's right. That was a day's work but we worked always from twelve to thirteen to fourteen hours a day.

Q. And so with that twelve, thirteen or fourteen hours a day doing that heavy work, you began to get tired?

A. That's right.

Q. All right. Now then were you put back to work then after that?

A. No. When I went out in '59, May the 23d. and I was out until about September—

Q. Oh, that's—I see.

A. —until about September, and the doctor, he wrote me a release to go back to work.

Q. And when was that, now? September of '59?

A. If I ain't badly mistaken, I went back about, I believe it was the last of August, I disremember the date, I can go back and get it.

Q. Well, anyway, in that area, around August of '59?

A. That's right. The doctor sent me back to work, said I was O.K.

Q. Which doctor?

A. Dr. Alexander. He's my family doctor.

Q. C. W. Alexander?

A. C. W. Alexander.

[fol. 30] Q. All right. And had you felt able to go back to work before this August of '59 date?

A. Yes, I could have went back.

Q. How did you feel?

A. I felt O.K. I had lost weight and I had done got my pressure down and I was feeling fine.

Q. That's the question I wanted to ask you. At that time when you felt able to go back to work, about what did you weigh then, what had you got your weight down to?

A. He had got it down to about—he got it down to about 195 pounds then.

Q. Yes.

A. But I was still losing weight.

Q. I see. Were you doing it—how were you doing it? By medicine or by diet or both?

A. Both of them, medicine and diet.

Q. Yes. Now in August of 1959, and that's where we are now, you are still off work at Swift and Company but your doctor had given you orders to go back. Now, what happened?

A. Dr. Safers refused to put me back at that time.

Q. That's the company doctor?

A. That's the company doctor.

Q. All right. Then what happened?

A. And I went ahead on and just about September, about September the 16th or 17th he give me another statement,—

[fol. 31] Q. We are still in '59?

A. That's same in '59, he gave me another statement, I taken that one to Dr. Safer.

Q. Who gave you that statement, Dr. Alexander?

A. Dr. C. W. Alexander.

(Plaintiff's Exhibit No. 1 marked for identification)

By Mr. Browne:

Q. Here is Plaintiff's Exhibit 1, I will ask you if these two letters on here that are stamped—I mean printed, "C. W. Alexander", are the two statements that you have referred to, to the jury? Are they?

A. No.

Q. Here is the one.

A. Neither one of these.

Q. Oh. He gave you a different one?

A. No, the company has got those.

Q. These were in addition?

A. That's right.

Q. Let me ask you if you got these—I see the dates are different.

A. Yes.

Q. Here is one dated 5-19-'60, May 19th, I suppose, from Dr. Alexander, one dated July 8, 1960, and one from Dr. John M. Gill, that is dated, looks like July 6, 1960. Are these statements that you got from those doctors?

A. Yes, but I didn't get these here statements for the doctor, I got these here statements here for the union.

Q. I know. Well, I am glad you made that clear. I will [fol. 32] take care of that now and then I will go back.

Mr. Browne: I now offer in evidence Plaintiff's Exhibit 1.

Mr. Panethiere: Your Honor, I object to the introduction of these records, there has been no foundation laid, it is hearsay, not the best evidence, Your Honor.

The Court: Sustained.

By Mr. Browne:

Q. Let me ask you this. Did you turn these over to Mr. Kobett during the fourth step of the union?

A. No, I turned it over to, I turned them statements over to Manuel Vaca and C. Mooney.

Q. I see. You turned these various statements or copies of them over to them?

A. That's right.

Mr. Browne: I again offer them.

Mr. Panethiere: Same objection, Your Honor.

The Court: Overruled.

(Plaintiff's Exhibit No. 1, so offered and received in evidence, is not included herein, but will be filed separately)

Mr. Browne: Now, this is going a little ahead of our story but as long as I have introduced these I will read them right now, if I may.

Here is one "Dr. John M. Gill, Physician and Surgeon", in the heading here, I will pass these to you—looks like 7-6-'60. "This certifies I have taken the blood pressure of Benjamin Owens 7-6-'60 reading systolic 160, diastolic 100." [fol. 33] Signed "J. M. Gill."

Then, "C. W. Alexander, M.D.", and his office address, and so forth. "To whom it may concern. This is to certify that Benjamin Owens has been examined and found able to resume work 5-19-60", signed "C. W. Alexander, M.D."

Here is another one on the letterhead of C. W. Alexander, M.D., 7-8-'60, "To whom it may concern, this is to certify that Benjamin Owens has been examined by me, his blood pressure is 160 over 100. It is my opinion he is physically able to perform regular work."

(Plaintiff's Exhibits Nos. 2 and 3 marked for identification)

Mr. Browne: Here is another one that I should have offered so they could be passing them all at the same time. I will identify that, if I may.

By Mr. Browne:

Q. Plaintiff's Exhibit 3, I will ask you if these are letters that you also showed to the union?

A. Yes, sir.

Q. Dr. Hesser, no date on it that I can find—yes, there is, March 24, 1960, and Dr. Bruce McDonald, May 18, 1960.

A. That's right.

Q. Are they?

A. That's right.

Mr. Browne: I wish to offer those in evidence and show to the jury.

(Whereupon, the following proceedings were entered of [fol. 34] record in the presence but out of the hearing of the jury:)

Mr. Panethiere: Your Honor, I think these are objectionable but I think maybe—

If you will agree, I will let any medical you have in without objection, I have one medical—

Mr. Browne: Might I see it, though. I can probably agree—

(Discussion outside the record)

The Court: The defendants' objections to plaintiff's exhibits 2 and 3 are withdrawn, I take it?

Mr. Panethiere: Yes.

The Court: They are admitted in evidence.

(Plaintiff's Exhibits Nos. 2 and 3, so offered and received in evidence, are not included herein, but will be filed separately.)

[fol. 38]

By Mr. Browne:

Q. Now, we were up to when you presented, or when this Dr. Alexander told you to go back and go to work back there. One thing I forgot to ask you, counsel for the defendants said that you were not a member of the Union. Were you a member of the Union?

A. Yes, I was a member of the Union.

Q. Speak a little louder, please.

A. Yes, I was a member of the Union.

Q. All right. Now let's go on to when this Dr. Alexander cleared you to go back to work. What did you do?

A. I went back to Dr. Safer.

[fol. 39] Q. That's the company doctor?

A. That's the company doctor. He refused to put me back to work. He told me that Dr. Alexander didn't know what he was talking about.

Q. All right.

A. And told me to go home and get in my bed and lay down and rest and live my life out.

Q. Did you do that?

A. I couldn't do that because I wasn't able to that long. How was I going to go home and get in bed and live my life out, and they didn't give me nothing?

Q. Now, Benny, what did you do?

A. I left and I went to a doctor, his name is Sherman Steinzeig.

Q. Steinzeig?

A. Steinzeig, he's a young—

Q. Where is his office?

A. 772 New Brotherhood Building.

Q. In Kansas City, Kansas?

A. Kansas City, Kansas.

Q. Did he examine you?

A. Dr. Steinzeig examined me and he waited on me for about three weeks.

Q. Then what happened?

A. He sent me back to work.

Q. Did you get to go to work?

A. I went to work that time.

[fol. 40] Q. Now, counsel for the defendant stated to the jury in his opening statement that you went in on some kind of a subterfuge, or concealment, if I got him correctly, that you told them something that wasn't so.

A. No. No. No way in the world I could have done that.

Q. What did happen?

A. There was a nurse down there, her name is Helen.

Q. Ella?

A. Helen. Helen.

Q. Helen. Where was she? Where was she then?

A. She was Swift's nurse.

Q. All right. What happened?

A. I taken the statement in there to Helen.

Q. Statement from whom?

A. From Dr. Safers—not Safers—Steinzeig.

Q. Steinzeig, this doctor you had examine you?

A. That's right.

Q. All right.

A. Helen taken the statement and she put me to work.

Q. Did you go to work?

A. I went to work but I didn't go the day of the fifth of January, that's when I was down there on the fifth day of January, 1960.

Q. You didn't go that very day?

A. I didn't go that very day.

Q. What day did you go?

A. Helen wrote me two statements, she told me this, [fol. 41] she says, "Now, you take this down to your foreman to certify that you are back to work."

Q. Did you do that?

A. I done this, and my foreman told me, he say, "You come to work at seven o'clock in the morning."

Q. That's next day?

A. That's right. And she gives me another statement, she says, "Take this here down there to the time office and give it to them down there."—

Q. Did you do that?

A. I done that—"and he will put your card back in the rack."

Q. Did they put your card back in the rack?

A. They put my card back in the rack.

Q. That's your time card?

A. That's my time card.

Q. Then what happened?

A. The next morning I went back to work.

Q. At what time?

A. Seven o'clock on January 6, 1960.

Q. What job did you go to work on?

A. When I went back to work I went back to work doing the same thing that I had done when I left there.

Q. Hanging these chucks?

A. Heisting these chucks. I went back doing the same thing.

[fol. 42] Q. Could you handle them?

A. I could handle them. I handled them every day that I was there the three days I was there, January the 6th, January the 7th and January the 8th, but the superintendent fired me on a Friday at three-thirty January the 8th, on a Friday evening.

Mr. Panethiere: Who fired you?

The Witness: Superintendent of the shop, he comes and he pulls me off of the job and fired me and told me, "That's all for you and Swift and Company." I asked him the reasons—

By Mr. Browne:

Q. What happened?

A. He says, "Well, you just ain't able to work," he says, "you are a liability to the plant, I just can't use you no longer."

Q. That was five o'clock on the third day you—

A. Three-thirty.

Q. Had you done your full day's work on that day?

A. Yes, but this other two days I worked ten hours a day, I made twenty-eight hours.

Q. Normal day is eight hours?

A. That's right, I made ten hours on the day of the 6th, I made ten hours on the day of the 7th and I made eight hours on the day of the 8th.

Q. But were still going?

A. I was still working, I would have worked ten hours [fol. 43] that day but he fired me at three-thirty.

Q. How did you feel?

A. I was feeling fine.

Q. I mean physically?

A. That's right.

Q. Were you handling the work on that day?

A. I was handling the work on that day.

Q. Had you made any complaint to anybody or had anybody made any complaint that you know of about your work?

A. No.

Q. Were you still doing the same thing?

A. I was doing—when the superintendent of the shop comes and pulls me off the job at three o'clock in the evening, it was three o'clock when he pulled me off, and he talked to me a while and he said, "Well," he said, "Well," he said, "You go on back and work," he says, "you work till three-thirty."

Q. When did he tell you that?

A. He told me that at the same time when he fired me.

Q. I am not—I am mixed up, now. He fired you about three-thirty.

A. I said three-thirty—he pulls me off the job at three o'clock, three o'clock in the evening, and he talked to me about five minutes.

Q. Yes.

A. And he told me to go get on back and make my full day out.

[fol. 45] Q. All right. Now, were you ever able to get back on the job then after that time?

A. No, no.

Q. Did you try? I mean were you willing and felt able to go back at all times?

A. That's right, I tried and I carried doctors' statements down there to the company that we ain't got here, they got them.

Q. Oh, you turned them in?

A. That's right. These here statements what we got here themselves, the statements I got and turned directly to the Union.

By Mr. Browne:

Q. Now then what is the next thing you did after they wouldn't put you back, or took you off the job, let's say, and said that you couldn't work for them any more, what did you do, as a union member?

A. The first man that I went to was a man they called Jeffrey Rush.

Q. Rush?

A. That's right.

Q. What was his job in the union?

A. Well, he was the treasurer of the union and he also was a representative, representative of the—

Q. Was he a steward or just a representative?

[fol. 46] A. He was a representative.

Q. Business representative?

A. That's right.

Q. All right, Mr. Rush, and what did you do with reference to making a complaint or not in this matter, or grievance?

A. It was on a Friday evening, I went to Mr. Rush and I told him what had happened, I told him Mr. Sharp had just fired me on account of my health, and Mr. Rush told me this, he said, "Mr. Sharp is always doing something that he ain't got no business," he say, "I ain't going to let him get away with it."

Q. All right. So did you put the matter—

A. He looked at his watch and he says, "Well, it's a little late now," he says, "It's a little late, I can't do you no good this evening, but," he said, "I will tell you what you do, you meet me in the union hall at twelve o'clock Monday," he says, "we will get this here matter straightened up right quick."

Q. Did you go there as he asked you to?

A. Yes, I did.

Q. I will ask you whether or not then you put your grievance in the hands of the union?

A. I did.

Q. All right. Then what is the next thing that happened?

A. Monday when I went there Mr. Rush, he came out, and they had a president by the name of Dave—

Q. I didn't get that at all.

[fol. 47] A. I say it was the president there of the union, his name was Dave Flaherty.

Q. Flaherty?

A. No.

Q. Were you still doing the same thing?

A. I was doing—when the superintendent of the shop comes and pulls me off the job at three o'clock in the evening, it was three o'clock when he pulled me off, and he talked to me a while and he said, "Well," he said, "Well," he said, "You go on back and work," he says, "you work till three-thirty."

Q. When did he tell you that?

A. He told me that at the same time when he fired me.

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A. I said three-thirty—he pulls me off the job at three o'clock, three o'clock in the evening, and he talked to me about five minutes.

Q. Yes.

A. And he told me to go get on back and make my full day out.

[fol. 45] Q. All right. Now, were you ever able to get back on the job then after that time?

A. No, no.

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A. That's right, I tried and I carried doctors' statements down there to the company that we ain't got here, they got them.

Q. Oh, you turned them in?

A. That's right. These here statements what we got here themselves, the statements I got and turned directly to the Union.

By Mr. Browne:

Q. Now then what is the next thing you did after they wouldn't put you back, or took you off the job, let's say, and said that you couldn't work for them any more, what did you do, as a union member?

A. The first man that I went to was a man they called Jeffrey Rush.

Q. Rush?

A. That's right.

Q. What was his job in the union?

A. Well, he was the treasurer of the union and he also was a representative, representative of the—

Q. Was he a steward or just a representative?

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Q. All right. So did you put the matter—

A. He looked at his watch and he says, "Well, it's a little late now," he says, "It's a little late, I can't do you no good this evening, but," he said, "I will tell you what you do, you meet me in the union hall at twelve o'clock Monday," he says, "we will get this here matter straightened up right quick."

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Q. I didn't get that at all.

[fol. 47] A. I say it was the president there of the union, his name was Dave Flaherty.

Q. Flaherty?

A. Flaherty.

Q. Flaherty?

A. That's right.

Q. And what happened?

A. Mr. Jeffrey Rush comes in and told—

Q. Mr. Rush is the one that you first took your grievance to?

A. That's right.

Q. All right.

A. He told him, Mr. Dave—

Q. Mr.—

A. Dave Flaherty.

Q. Dave Flaherty. All right.

A. He says, "Mr. Sharp fired this man Friday on account of his health." Here is the answer that Mr. Dave give Rush. He says, "Oh, no, no," he says, "Mr. Sharp didn't fire Ben," he said, "the medical department fired him," he said, "that's who fired him," he said, "Mr. Sharp didn't fire him," he said, "the medical department fired him."

Q. Well, and in any event, did they push it? That's what I want to get at, and what steps you went through; tell the jury what happened.

A. Well, about eight months from then it went through the second step.

Q. Now, the first step was, we read that all off. Anyway you went through the first step?

A. Never went through no first step as I know of.

[fol. 48] Q. Whether you went through it or not, skipped it, any way, went on in the regular course to the next step?

A. That's right.

Q. Step two? All right. Then the second step what did you do? Now, that's the step with the division superintendent or general foreman. Did you go through that step or were you there then?

A. That's the second step?

Q. Yes.

A. Yes, I sat in on the second step.

Q. Who handled it for the union?

A. Well, Mr. C. Mooney was there.

Q. This gentleman?

A. Yes, the gentleman sitting right there.

Q. Mr. Mooney?

A. That's right.

Q. And was your grievance successful in the second step?

A. No. No. The superintendent just told them I wasn't coming back there, there wasn't no chance for me, told them that was it, and everybody just got up and walked off.

Q. Including you?

A. He didn't say not one word.

Q. Was there any evidence put on or any of these medical—things that the jury is seeing, any of that produced there at the second step?

[fol. 49] A. Well, the superintendent had an old what you call a work sheet which they wrote up himself and they went to some weak doctor—

Mr. Panethiere: Which doctor?

The Witness: A doctor they called Dr. Morris.

By Mr. Browne:

Q. Morris?

A. Morris, he was a practice doctor out there at the Kansas University.

Q. All right. In any event, to shorten it, your second step was unsuccessful?

A. Unsuccessful.

Q. The company turned it down?

A. Yes.

Q. All right. Then did the union take you through the third step and if so, tell what happened there. Now, let's see, that's the plant superintendent or his representative. Did they go through the third step with you?

A. They told me that they did.

Q. You weren't present?

A. I couldn't sit in.

Q. Oh.

A. They just only told me that they went through, whether they went through it, now, I don't know.

Q. Well, I know, but they told you that they had gone through that?

A. That's right.

Q. And unsuccessfully?

A. Yes.

Q. Is that right?

A. That's right.

Q. All right. Now then we are getting to the fourth step [fol. 50] and according to this that's the general superintendent of the company and the national representative of the union. Now, did you have some kind of a hearing in the fourth step?

A. Yes, we did.

Q. Where was that held?

A. It was held in the President Hotel approximately around the second floor.

Q. Here in town?

A. Here in town.

Q. In Kansas City, Missouri?

A. Kansas City, Missouri.

Q. And was this Mr. Kobetts, this gentleman right here behind your lawyer—

A. That's the gentleman right there.

Q. He participated for the national union?

A. That's right.

Q. You were allowed to go to that one, were you?

A. Yes, I sat in on that one.

Q. Now at that one were you given—had you given photographic copies of these medical reports to the union people?

A. Yes, medical reports, the same, they had them, it was turned over to them.

Q. Now, what happened in this fourth step hearing over in the President Hotel?

A. Well, they was unsuccessful.

Q. But did they actually tell you any result? Were you able to get the result at that time or did you just leave [fol. 51] after the hearing?

A. Well, no, not exactly left after the hearing, the superintendent told the union that they could take—here's just the way he spoke it—he says, "You all take this man to a heart association, to a heart association and," he says, "the heart association will give this man some money, and," he said, "it will teach this man to work, it will rehabilitate him, and," he says, "when he get out," he says, "he will honestly be making more money through the rehabilitation than he will with Swift and Company anyway," and so—

Q. Now, Mr. Owens, excuse me, were you finished with that? Now, at that time, tell the jury whether you still felt able to go to work or whether you did not?

A. I still felt like that I was able to go to work without going through any rehabilitation.

Q. All right. Now then did you make any request or not to the union to carry you through the fifth step where you would for the first time get a non-interested person as arbitrator?

Mr. Panethiere: I object to the leading questions, Your Honor.

The Court: Sustained.

Mr. Browne: I will change that.

By Mr. Browne:

Q. I will ask you if you made any request to go through [fol. 52] the fifth step of the union or whether you did not?

A. I did.

Q. To what official of the defendants did you make that request?

A. Mr. Mannel Vaca.

Q. V-a-c-a?

A. That's right.

Q. He lives in Missouri here?

A. That's right.

Q. And what request or what was your conversation—by the way, he was officer then of the local branch of the union?

A. He was president.

Q. All right. And what was your conversation with him? Just tell the jury exactly what was said there.

A. I asked him, asked Mr. Vaca about taking through the fifth step, Mr. Manuel Vaca told me, he says, "I ain't got money to take it to the fifth step," he says, "you give me three hundred dollars, that's what it takes, and I will take it to the fifth step." I told him, "I haven't got any three hundred dollars, if I had three hundred dollars I wouldn't be asking to be taken to the fifth step." So that's the way he left it. He asked me for three hundred dollars to represent me for the fifth step.

Q. Did you ever have any agreement that you would pay three hundred dollars or anything else?

A. No, sir.

Q. To the union for doing what this contract tells them to do?

[fol. 53] **Mr. Panethiere:** Your Honor, I object to counsel testifying.

The Court: Leading question, yes, that will be stricken from the record, the jury will disregard it.

By Mr. Browne:

Q. Did you have any understanding or not at any time that they were to be paid, or Vaca, or anybody else was to be paid three hundred dollars to process your claim through the fifth step? Did you ever have any agreement with anyone?

A. No.

Q. Mr. Owens, then after that, I will ask you whether or not, when you got an attorney to continue with this matter, did you or did you not get an attorney?

A. I did.

Q. Have you ever been able to get back on the job or go through the fifth step, or do any of that?

A. No, no.

Q. About how many members are there in the union locally here and in this area, about?

A. I would say about eight thousand.

Q. No, I mean here in this area.

A. Oh, in this area?

Q. Yes.

A. Between twelve and sixteen hundred.

Q. And about how many nationally in the whole union? I mean as far as you can estimate.

A. Just a rough guess, I'd say about eight thousand.

[fol 54] Q. All right. Did you at the time this suit was filed know of any other members of the union that lived in this state of Missouri except the ones you named who were Mr. Mooney, Mr. Vaca and Mr. Kobett?

A. No, no.

(Recess)

By Mr. Browne:

Q. I have forgotten my last question but anyway let me ask you as to what in the nature of work, if you will tell the jury, you have been able to do, what kind of work you have been able to get during the intervening, what is it, three and a half years since Swift refused to let you go back on what, you told the date, but around August of '60. Now what have you done since then?

A. Well,—

Q. Speak loud.

A. I have done a little contract work, cutting cement, roofing houses, and I have helped on jobs, I worked at the Jewish Center out here on the—87th and Holmes I believe it is if I ain't badly mistaken, and I have worked for—I worked for the Overland Park car wash for several months.

Q. Car wash?

A. That's right.

Q. All right.

A. And my regular job where I works every year, it's a seasonable job down here at Farm Belt, 2400 State Line in Armourdale down here on the river.

[fol. 55] Q. What is the name of that company? Is it a company?

A. It is a company, we puts out fertilizer. Here is the last four checks.

Q. What is the name of the company?

A. Spencer.

Q. Spencer Chemical Company?

A. Yes, Spencer Chemical Company. Some of you may be acquainted with it. I work there every year but just as I said, it is a seasonable job, I just work there, you know, putting the grain in and the farm in, just farm work, after then they lays me off. After they lays me off, then I goes and puts in my compensation, I draws compensation probably for about two or three months and then they calls me back, I goes back to Farm Belt, I goes back to Farm Belt and I handle those sacks, used to be a hundred pounds but they have cut them down to fifty pounds and eighty pounds now, and they handles just about five a minute.

Q. What, come by you five a minute?

A. Just about five a minute.

Q. What could you do with the fifty and eighty pound sacks?

A. Well, we puts them on trucks—

Mr. Panethiere: Your Honor, it is in evidence fifty pounds, I object to counsel changing his testimony, Your Honor.

The Court: Overruled.

Mr. Panethiere: I think he said fifty pounds.

[fol. 56] By Mr. Browne:

Q. How much do they weigh?

A. The biggest of them weigh fifty pounds but they do have some weighed eighty pounds.

Q. Fifty to eighty pounds, then?

A. That's right.

Q. Used to weigh how much?

A. One hundred.

Q. Did you handle those, too, manhandle those hundred pounders when they had them?

A. Yes, sir.

Q. Did you handle them yourself?

A. You have to handle them yourself.

Q. What do you do with those sacks, fifty, eighty, formerly hundred pounders?

A. You have to get a truck load, I has the truck, I pulls it in the box car wherever it is going, storage, you know, maybe they want to keep it, maybe they are shipping it out, maybe they were shipping out a thousand, two thousand sacks, you know, to some point, you know, some city, and so on.

Q. Does this call for any lifting, these sacks?

A. All lifting.

Q. How high? How much do you have to lift them?

A. The fifty pound sacks go as high as seventeen high.

Q. Wait a minute. You mean lifting from the floor—

A. You start from the floor.

Q. Yes.

A. And up.

Q. How do you get up seventeen sacks high?

[fol. 57] A. You put them up there.

Q. Oh, they must be laid on their sides, is that it?

A. Yes, laid right flat, you put one on top of the other.

Q. Well then you have to heist it over your head, I guess?

A. Sure.

Q. Has this been going on—this is the Spencer Chemical job you are talking about?

A. That's right.

Q. About how many hours a day do you do that work heisting fifty to eighty pound sacks as high as seventeen high sometimes?

A. We works, we works about, about thirteen or fourteen hours.

Q. A day?

A. A day.

Q. And how steady, you said it is seasonal work?

A. It is seasonal work.

Q. When it is going, how steady, how many days a week, about?

A. We works six days a week.

Q. Are you able to handle that job?

A. Able to handle it. They just laid me off last week.

Q. Laid you off on account of health, or—

A. No, no, no, no, laid off because lack of work.

[fol. 58] Q. Are you able, have you been able to get a job with some major company, I mean an all-year around job, since this happened, since you were laid off there at Swifts?

A. No, I haven't.

Q. Why not?

A. For the reason I ain't got no recommendation.

[fol. 59] Q. All right.

A. Swift won't recommend me, on the recommendation he would give it won't do me no good, he will put that sick charge against me, he will tell the man "He worked for us so many years, he was a good man but he's sick now, he just ain't able to work."

Mr. Panethiere: Your Honor, I object to the answer, not responsive to the question.

The Court: Sustained.

By Mr. Browne:

Q. All right, now, besides Spencers—or maybe the jury would rather pass those around. Let me ask you what your earning, to put it in a yearly basis, you said on the monthly—I mean the hourly basis, but in a year's time about what were you earning at Swift and Company?

A. About sixty-two, sixty-five hundred dollars a year at the time when I left.

Q. Now, to give—you have mentioned the Spencer Chemical and some others and I didn't mean to cut you off on that. Are there other heavy jobs that you have done since you have been off from Swifts, as you could get them? If so, tell the jury.

A. Yes. As I say, I worked for Overland Park and I worked for—

Q. Was that the City of Overland Park?

A. Overland Park.

[fol. 60] Q. The City? Overland Park?

A. Overland Park, Kansas.

Q. Well, what kind of work?

A. Well, that's a light job.

Q. Oh.

A. That's just, you know, washing and drying cars.

Q. Oh, the—I know.

A. I know you have been around these car washes.

Q. Carwashing?

A. Yes.

Q. That is not too hard a work?

A. No, that's not too hard a work.

Q. A lot of stooping, I guess, and all that; no heavy lifting.

A. That's right.

Q. What else have you done?

A. I worked for this here Shostak Iron and Metal over here at Third and Broadway.

Q. Was that heavy work or not?

A. Yes, that's heavy work around a junk yard, handling iron.

Q. Lifting iron?

A. Handling iron, cutting iron on the machine, you know.

Q. Could you do that lifting?

A. Yes.

Q. What other kind of work?

A. Another kind of work, when I runs out of work, working for a company, I just makes my own jobs.

Q. Like what?

A. Like trimming trees, cutting down trees, cutting [fol. 61] yards, and cleaning houses, cleaning out basements.

Q. Oh. Just for people?

A. Yes.

Q. Yard work?

A. Yes.

Q. Does that include some heavy work and some not heavy work?

A. It runs in to heavy work sometimes.

Q. Are you able to do that?

A. Yes, sir.

Q. All right. Did you ever agree that your grievance be held by the union in the fourth step?

A. No, not at—no, not at the last time, no.

Q. Now, during this time that you have been off from Swifts, I will ask you whether or not they have called back people to work that were junior to you, on the seniority list?

A. Oh, sure. Yes.

[fol. 68] (Witness excused.)

Cross examination.

By Mr. Panethiere:

Q. Mr. Owens, when you took off—you went on sick leave did you not?

A. That's right.

Q. And when did you take, or start your sick leave?

A. The last day I worked was on 23rd of May.

Q. That is 1959?

A. 1959.

Q. If I understand, understood your testimony correctly [fol. 69] you said you went out feeling bad.

A. Yes, I was feeling bad and I was tired.

Q. And you went to Dr. Phillip Saper?

A. I went and reported to Dr. Phillip Saper before I went.

Q. He is the company's doctor, he is the plant physician, is he not, right there at Swift and Company?

A. Yes.

Q. What did he tell you?

A. He taken my pressure.

Q. Your blood pressure?

A. Yes, he told me I was all right, go ahead on, that I would get my money, don't worry about that.

Q. What did he mean, told you to go ahead on?

A. Don't worry about my money because he would see to me getting my money.

Q. You had some sick leave pay coming under the contract?

A. That's right.

Q. All right. Now, when you went off on May 23rd, who was the first doctor that you saw after that?

A. Dr. C. W. Alexander.

Q. When was the first time you saw him?

A. The first time?

Q. Yes.

A. Well, Dr. C. W. Alexander has been my doctor for the last twenty years.

Q. And after May 23rd, when is the first time you saw him?

[fol. 70] Mr. Browne: '59?

By Mr. Panethiere:

Q. Of 1959.

A. The next day, May the 24th, which was on a Saturday, I am pretty sure.

Q. Did he give you a complete examination?

A. Not right then he didn't.

Q. Did he prescribe any medication for you?

A. He just give me some temporarily right then. I told him—now, he didn't request me to go to the hospital. I requested myself.

Q. And he put you in the hospital?

A. That's right.

Q. That was the K.U. Medical Center?

A. No, I went to Douglas.

Q. Douglas Hospital?

A. That's right.

Q. When were you admitted to Douglas Hospital?

A. That was on a Saturday, as I said, and I went to Douglas Hospital, I got there on a Monday night, Monday night, I believe it was about May, maybe it was about the 25th of May when I went in to Douglas Hospital.

Q. In other words, you requested your sick leave effective May 23rd?

A. Yes, sir.

Q. You saw Dr. Saper that day?

A. I didn't see Dr. Saper until May the 24th.

Q. That is the next day?

A. No, that was on a Monday because—

[fol. 71] Q. I am talking about the company doctor.

A. The company doctor, I didn't see him until the 25th.

Q. All right. You saw Dr. Alexander on the 24th?

A. Yes, that's right, on a Saturday.

Q. And he wanted to put you in the hospital?

A. That's right. At least, I requested to go.

Q. How long did you stay in Douglas Hospital?

A. I stayed there one week at that time.

Q. And after you were released from the hospital, you were still under the care of Dr. Alexander?

A. I was.

Q. How long did you remain under his care?

A. About two months and a half before he releases me to go back to work.

Q. That takes you up until, is that when you referred to sometime in August?

A. August.

Q. He released you to go back to work?

A. He released me to go back to work.

Q. When you reported back for work, did they in the company require you to take a physical examination?

A. No, no, not the company.

Q. Did you see Dr. Saper at all?

A. I seen Dr. Saper.

Q. What did he tell you?

A. Dr. Saper just taken my pressure and told me I wasn't near ready to go to work by a long shot, that that [fol. 72] doctor didn't know what he was talking about.

Q. He was talking about the company doctor, now?

A. No—yes, I am talking about the company doctor now.

Mr. Browne: The company doctor is talking about his doctor.

By Mr. Panethiere:

Q. Dr. Saper is the company doctor, is that right?

A. That's right.

Q. Then you went back and you didn't—you stayed off work some more?

A. That's right.

Q. You were still drawing your sick leave?

A. I was still drawing my sick leave.

Q. When would your sick leave pay expire, when would it end, how much sick leave did you have coming?

A. I believe, they paid me sixty per cent of my wages for twenty-seven weeks and sixty per cent come to \$63.00—

Q. I don't mean the amount. When would the twenty-seven weeks be up from May 23rd?

A. Well, they quit paying me somewhere around about the second week in June in 1960.

Q. That's about the time that you had this letter from Dr. Steinzeig that you took in to the nurse, is that right?

A. Yes, sir, about a week after then.

Q. About a week after your sick leave time was up?

A. Yes.

[fol. 73] Q. Now, you are not saying, are you, Mr. Owens, that the union had anything to do with having you fired?

A. No, sir.

Q. And when they told you there on January the 8th that you were terminated, that was the company, was it not?

A. That was the company.

Q. There was no member of the union present when you were terminated?

A. Well, the way, I didn't get the words come out of the man's mouth but it was out working in a bunch of men, about twenty men was in the bunch.

Q. I mean any official of the union, steward or any of the officials?

A. No, there was none there right at that particular time then.

Q. When you were notified you were terminated, you went that same day, did you not, and talked to Mr. Jeffrey Rush?

A. Yes, sir, that's right.

Q. He told you that he didn't think you got a square deal and the union was going to take care of it?

A. That's right.

Q. All right. Then you saw Dave Flaherty the next day? Are you sure it was Dave Flaherty?

A. Dave Flaherty, yes.

Q. He was president of the local?

A. That's right. But I didn't see him the next day. This [fol. 74] here happened on a Friday, and I didn't see Dave and the union officials no more until that coming Monday.

Q. Now, you remember filing your grievance?

A. That's right.

Q. And the union did process that grievance for you, did they not?

Mr. Browne: You mean all the way through, counsel?

Mr. Panethiere: I am talking about processing.

Mr. Browne: I don't know what he means by processing.

The Court: Overruled. He may answer.

By Mr. Panethiere:

Q. Did the union take steps to try to get your job back?

A. Well, I turned it in on the eleventh.

Q. The eleventh of January?

A. Of January.

Q. All right.

A. 1960, and the first time that they made an effort to the second step is way up in August.

Q. But they had a first step before that, did they not?

A. They—if they went through any first step, I doesn't know anything about it.

Q. In order to have the second step, Mr. Owens, it is obvious you have to have the first step.

A. I say if they went through a first step, I don't know nothing about it.

[fol. 75] Q. So then after you notified the union there was some question about your physical condition?

A. That's right.

Q. Isn't that what it all boiled down to?

A. That's what it all boiled down to.

Q. That is when you started to going to these different doctors?

A. Right.

Q. Now, how many doctors have you actually seen, Mr. Owens, if you can remember them all?

A. Let's see—

Q. I mean give me their names.

A. Oh. C. W. Alexander.

Q. Wait just a minute. All right.

A. Dr. Hesser.

Q. That is Heizer?

A. Hesser.

Q. Hesser?

A. Yes, sir.

Q. H-e-s-s-e-r?

A. Yes, sir.

Q. All right.

A. Dr. McDonald.

Q. All right.

A. And Dr. Gill.

Q. All right. Now, you also saw Dr. Saper, did you not? That is this plant doctor.

A. Oh, yes, I had to see him.

Q. You also saw Dr. Morris out at the K. U. Medical Center, didn't you?

A. Dr. Morris?

Q. Yes.

A. Yes, I seen Dr. Morris.

Q. You also saw a Dr. Day?

A. I don't know what the man was, I never seen the [fol. 76] man from, that was my first time ever seeing the man in my life and I never saw him no more from that day to this.

Q. Who are you talking about, Dr. Day?

A. Dr. Day.

Q. You did see him, then?

A. I saw him at the time, you know, when the union—

Q. I will get to that but you did see him too. All right. Now, Dr. Alexander was your treating doctor, was he not, he took care of you for twenty years?

A. That's right.

Q. Why did you go to Dr. Gill?

A. Why did I go to Dr. Gill?

Q. Why did you go to Dr. Gill?

A. Well, this doctor just kept a preaching to me that, you know, that my condition was so bad, it was beginning to worry me.

Mr. Browne: Which doctor kept telling you that?

A. The company doctor.

Mr. Panethiere: Your Honor, I would appreciate if counsel would let me ask the questions here.

The Court: That is correct.

Mr. Browne: All right.

A. I forgot a doctor in there.

By Mr. Panethiere:

Q. Which one is that?

A. Sherman Steinzeig. He is the man I went to work under.

Q. All right. Now my question was how did you happen [fol. 77] to go to Dr. Gill?

A. Dr. Gill?

Q. Yes.

A. Well, I always went, I went to Dr. Gill too, for small things, I used Dr. Gill.

Q. Do you remember seeing him in July, about July 6th of 1960?

A. I think so.

Q. Now this was after your grievance had already been started. Right? You told the union about that grievance in January?

A. I told them about it, yes.

Q. And you had your—

A. But nothing hadn't been done.

Q. As far as any of these second or third or fourth steps?

A. Not a single step out of all of that time.

Q. But then you saw him on July 6th?

A. That's right.

Q. All right. What did you tell Dr. Gill when you went in to see him?

A. I just went in, you know, because the company's doctors all made out like that my pressure was so high, you know, that I was going to die, I was concerned, I was earnestly concerned in my health, I went to Dr. Gill, went to these different doctors, these doctors don't know nothing about one another, all of them give me the same reason, the same reason, I was concerned, it was scaring me.

Q. Why did you tell Dr. Gill you needed some kind of [fol. 78] statement from him?

A. To show these people that I was getting a rough deal out of the company.

Q. And you requested him to take your blood pressure and put it down?

A. That's right.

Q. That's what he did here on plaintiff's exhibit 1, it shows the blood pressure. Did he make an examination of any part of your body other than taking your blood pressure?

A. No, that's all, he taken just the blood pressure.

Q. All he did was take your blood pressure?

A. That's right.

Q. Had you known Dr. Gill before?

A. Yes, I been knowing Dr. Gill the last, about fifteen years.

Q. He is a friend of yours? You know him personally?

A. No, no more than just in his office. We didn't go to church together or lodge together, you know, anything like that. Just I just only see him there in his office when I want quick service, you know, and stuff, because he didn't have too many patients and I could just walk right in there, you know, and just walk right out, but Dr. Alexander was different, you go in his office, you are liable to have to stay in there—

Q. Well, Dr. Alexander, two different times here in May said that you were able to resume work, then in July you go to Dr. Gill. You didn't believe Dr. Alexander?

[fol. 79] Mr. Browne: Objected to as argumentative.

Mr. Panethiere: This is cross-examination, Your Honor.

The Court: Overruled.

A. Just as I said, when one man disputed the other man, I am going to go to two or three more men, you know, then I am going to take the biggest majority. Dr. Saper told me that Dr. Alexander was lying and he didn't know what he was talking about about my blood pressure. Dr. Alexander give me a reading of 160, 170, went on like that, then I turned right in then and goes to Dr. Saper and Dr. Saper say that my blood pressure was so high he couldn't take it, 265—you know—I was beginning to get concerned.

Q. Well, anybody would be concerned about their health. That is what the whole issue here is, isn't it, Mr. Owens, is your health condition?

A. That's right.

Mr. Browne: What the issue is will be for the Court to determine. We object to that.

The Court: Sustained.

By Mr. Panethiere:

Q. When you went to Dr. Gill, then you went to another doctor, didn't you? Two days later you went back to Dr. Alexander?

A. Yes.

Q. All right. And you asked him for a report. All right. [fol. 80] And prior to that time on May 18th you went to Dr. McDonald. Right?

A. That's right.

Q. How many times did you see Dr. McDonald?

A. As near as I can remember it was about five different times.

Q. Was he treating you?

A. Yes, he give me some pills and told me to get on a light diet.

Q. Now, this was in early May of 1960?

A. That's right.

Q. You had been off work over a year at that time?

A. Around about a year.

Q. And you still found it necessary to take treatment, weren't you still being treated by a doctor? Isn't that correct? You will have to answer, she can't take down the nods, see.

A. That's correct.

Q. But then he stated, or you requested of him a statement as to whether or not you could return to work, isn't that right?

A. But as far as the treatment is concerned, every doctor that I went to, he told me it would pay me to stay under treatment the rest of my life.

Q. Well, my question is this, did you request of Dr. McDonald a statement; you told him you wanted to go back to work, didn't you?

A. That's right. I did.

[fol. 81] Q. And he gave you that statement. That is plaintiff's exhibit 3 we are talking about here. Do you remember getting that from Dr. McDonald?

A. I sure do.

Q. Also you had a similar one from Dr. Hesser just about a month before?

A. No, it was longer than that.

Q. Well, March of 1960—beg your pardon, about two months before, and how did you happen to see Dr. Hesser?

A. The union told me to go and see Dr. Hesser. Dr. Hesser is the union doctor.

Q. All right. And he gave you this report here showing—he made a complete examination, didn't he?

A. He just only taken my blood pressure and my heart, you know, because Dr. Hesser isn't—he's a surgeon doctor, that's what he is.

Q. Did the union tell you why they wanted these statements?

A. Yes.

Q. Actually the union told you to get these, didn't they?

A. That's right.

Q. Because they wanted to show that as far as your thinking was concerned that you felt that you were physically able to do the work?

A. That's right.

Q. And they asked you to get these, didn't they?

[fol. 82] A. They did.

Q. And you gave them to them?

A. That's right.

Q. And then they went on and processed it to the second step, didn't they?

A. Yes, I sat in on the second step.

Q. You were not present at that time, at that time these medical reports were all entered and were discussed back and forth between the company and the union?

A. No.

Q. Weren't these medical reports there?

A. Not in the second step. There wasn't a doctor's statement come up in the second step, nothing but this here—now, the company had that there work sheet there from Dr. Morris of the K. U. Medical Center.

Q. You know Mr. Sharp, don't you?

A. Yes, sir, I know him very well.

Q. What is his position with Swift and Company?

A. He is a plant superintendent.

(Defendant's Exhibit No. 17 marked for identification.)

By Mr. Panethiere:

Q. Can you remember about when this second step meeting was held?

A. Very well.

Q. What was the date?

A. About August.

Q. About August 18, 1960, would that be about right?

A. Yes, that sounds pretty close.

[fol. 83] Q. And were the persons present at that time Leonard Jamerson—

A. Leonard Jamerson and Caleb Mooney.

Q. He was a union representative, was he not?

A. That's right.

Q. Mr. Mooney was the vice-president of the union, is that right?

A. That's right.

Q. You were present?

A. I was present, yes.

Q. There was a Mr. H. T. Button, a foreman, present?

A. Howard Button.

Q. And Mr. Sharp, the division superintendent was present?

A. That's right.

Q. I will hand you what has been marked for identification as Defendant's Exhibit No. 17 and ask you to read

that, and see if that correctly reflects what happened on the day of that meeting? Do you need your glasses, Ben?

A. I need them but I ain't got them.

Mr. Browne: Try mine. I have got magnification in the lower half.

A. Yes, I remember. I remember.

By Mr. Panethiere:

Q. Does that refresh your memory now?

Mr. Browne: Let me take a look, too.

By Mr. Panethiere:

Q. My question is that correctly reflects what happened at that second step meeting; does it not? That's about what happened that shows here?

[fol. 84] A. I remember the meeting, they was there and Mr. Sharp done all the talking.

Q. Well, my question is this, does this correctly reflect what happened at that meeting?

A. Yes, except Mr.

Q. My question is this, does this correctly reflect what happened at that meeting?

A. Yes.

Mr. Panethiere: Your Honor, I offer in evidence Defendant's Exhibit No. 17.

Mr. Browne: Objected to as self-serving.

The Court: Overruled. It will be received.

(Defendant's Exhibit No. 17, so offered and received in evidence, is not included herein, but will be filed separately).

Mr. Panethiere: Defendant's Exhibit No. 17, I will read to the jury, it is very short.

(Defendant's Exhibit No. 17 was read to the jury by counsel)

By Mr. Panethiere:

Q. Now, my question initially, was weren't these presented and discussed at the second step?

Mr. Browne: What? What are you talking about?

Mr. Panethiere: Plaintiff's Exhibits 1 and 3, the medical reports that you obtained at the union's request.

A. The superintendent talked.

[fol. 85] By Mr. Panethiere:

Q. Pardon?

A. The superintendent talked.

Q. Well, my question, you were there, were you not?

A. I was there, that's how I know.

Q. The purpose of the meeting was to discuss your grievance, wasn't it?

A. That's right, and I am telling you what happened.

Q. Weren't these medical reports shown to the company?

A. No, not them, no.

Q. Well, which ones were, then?

A. Mr. Sharp had a medical report there that he claimed that he went out to the K. U. Medical Center to where I had been, talking treatments out there and got and that's the onliest one I seen, what they called the work sheet.

Q. That is Dr. Morris that he is talking about?

A. That's right.

Q. And that is referred to in that note, isn't it, minutes of the meeting, that is referred to?

A. Yes.

Q. Also refers to that the company's position, states that the company furnished medical statements showing that your blood pressure had improved, and they were referring to these statements, weren't they?

A. No. No. No, not then.

Mr. Browne: What statements, now?

[fol. 86] By Mr. Panethiere:

Q. What statements were they referring to, Ben?

A. I guess they was referring to their own statement, Mr. Sharp got a statement out there some kind of way.

Q. Maybe you don't understand me, Mr. Owens. I understand that the company's position at all times was that you were physically unable to work, is that correct, both by Dr. Saper and by Dr. Morris, is that correct, they both said that you were physically unable to work?

A. Dr. Saper did.

Q. Dr. Morris also said that, didn't he say that—

A. It was—Dr. Morris isn't got no record, he can't show a record in the world.

Q. My question is not whether they had a record, did they have some medical reports from Dr. Morris, stating that it was his opinion, his opinion that you were physically unable to work?

A. And I—

Q. Answer my question.

Mr. Browne: He's trying to. We object to counsel cutting him off.

A. I ain't going to tell you something against myself, I ain't going to do it.

By Mr. Panethiere:

Q. We don't want you to. Do you understand my question?

A. I understand what you are talking about but it is [fol. 87] not true.

Q. Now, what is not true about what I am talking about, Ben? I just asked you a question.

A. Dr. Sharp—when I—Dr. Saper went out there to K. U. Medical Center to where I had been taking treatment, and he got a statement from Dr. Morris saying that I wasn't able to work, and just a couple days before then Dr. Morris had wrote a letter to the union stating that I was

able to work on July, on the last day of July, 1960, Dr. Morris wrote a letter to the union stating that I was able to work.

Q. My question was this—

A. Just about August the first, August the third, Sharp and Dr. Saper went out to the K. U. Medical Center and got Dr. Morris to write this other letter saying that I wasn't able to work. That was the honest truth.

Mr. Panethiere: I object to the answer, Your Honor.

The Court: Sustained.

By Mr. Panethiere:

Q. At the second step meeting there was a medical report from Dr. Morris?

A. Dr. Morris. Right.

Q. In that report it was stated that in his opinion you were unable to work. Right?

A. His opinion.

Q. That was my whole question. The position of the union was that your blood pressure had improved and that you should be put on some kind of a job, isn't that what [fol. 88] they said?

A. No.

Q. Second step?

A. No, not no second step, no.

Q. What did the union say?

A. Mr. Mooney did ask, "Can't you find no kind of work for this man to do?"

Q. Who said that?

A. Mr. Mooney, Mr. C. Mooney. He said no, no, so Mr. Mooney didn't say another—that was the onliest words that was said concerning me going back to work.

Q. I hate to interrupt you but we are talking about a second step.

A. I am talking about the second step.

Q. Mr. Mooney wasn't even present at the second step.

A. Oh, yes, yes, sir, he was present at the second step.

Q. And they were trying to get you a job, weren't they?

A. He did tell Mr. Sharp, he asked Mr. Sharp, he says, "Mr. Sharp," he says, "Mr. Sharp, can't you find nothing for this man to do, a clean-up job, or nothing?" Mr. Sharp just told him no, he says, "No", he says, "as far as my concern," he says, "Ben and Swift and Company is through as far as my concern," he said, "maybe you can find somebody else that will put him back to work but I ain't."

Q. After he told you that the union told—

A. Yes, Jamerson told me, he says, "Mr. Sharp, I have been going along with you a long time," he says, "I am [fol. 89] going to take it further." Mr. Sharp told Mr. Jamerson, "That's all", he said, "go on and take it further, if anybody else—"

Q. So the meeting adjourned with the understanding that the union was going to take it on to the third step, isn't that right?

A. That's right.

Q. And shortly thereafter they did have a third step?

A. They said, as far as my concern I don't know nothing about it because I wasn't there.

Q. Did you have any discussion with any union members after the second step?

A. After the second step?

Q. Yes.

A. I am pretty sure I did.

Q. And what did they—who did you talk to?

A. Well, I talked to Mr. Jamerson and I talked to Manuel.

Q. You are talking about the president of the local, Mr. Vaca, at that time?

A. That's right, Mr. Manuel Vaca.

Q. What did they tell you?

A. Well, they said, you know, they was going to try to do all they could for me, and so on.

Q. All right. Now, were you informed that there was a third step, you weren't present?

[fol. 90] A. He told me that they had the third step.

Q. Now who told you that?

A. Mr. Jamerson.

Q. What did he tell you the results of that third step meeting were?

A. They didn't succeed.

Q. In other words, they were still at the same stage they were in the second step?

A. That's right.

Q. What did Mr. Jamerson tell you about further processing your grievance?

A. The fourth step going to the fourth step.

Q. Going on to the fourth step. All right. Did you have some discussion with Mr. Jamerson and the union officials about further medical examination?

A. Further examination?

Q. Yes.

A. That was after the fourth step.

Q. Before the fourth step?

A. No. No. All the medical statements was in when the second—when the second, second step came up, they all was in then.

Q. Ben, you remember they notified you there was going to be a fourth step?

A. The fourth step.

Q. Yes, and you were present, were you not?

A. In the fourth step.

Q. Yes.

A. At the President Hotel.

Q. Who was present at that meeting, who was there?

[fol 91] A. Mr. Kobett and his friend, I don't know his name, Mr. C. Mooney, Manuel Vaca, George Burton, George Burton and several more of them which I didn't even know.

Q. They had some people from Swift and Company from Chicago there, is that right?

Mr. Browne: Excuse me. At the President Hotel?

Mr. Panethiere: The President Hotel?

A. Yes.

By Mr. Panethiere:

Q. That is the fourth meeting we are talking about?

A. That's right.

Q. Mr. Kobett was there?

A. Mr. Kobett was there.

Q. Tell us what you remember generally of that meeting.

A. Well, Mr. Kobett, they had a meeting before the superintendent of the plant, which his name was Mr. Burns, the superintendent of Swift and Company, but before Mr. Burns came in, we was in there, Mr. Kobett and his friend was in there, I don't know his name, and they discussed what should be done with me, all of them seemed to be pleased that I should go back to work, Mr. Kobett and Mr. Burns, Manuel Vaca and Leonard Jamerson, of course, Mr. Mooney didn't say I should go back and I shouldn't go back, he stayed neutral.

Q. At that point the meeting was still in there plugging, trying to get your job back, is that right?

A. That's right.

[fol. 92] Q. And during, as the meeting progressed there were various medical records produced, weren't there?

A. Medical reports was produced, that's right.

Q. And as a result of those medical reports, the two parties couldn't get together and agree what to do with you, could they? In other words, Swift wouldn't put you back to work?

A. No, he wouldn't put me back to work.

Q. And you still weren't satisfied with the medical reports?

A. I wasn't satisfied!

Q. Wasn't satisfied?

A. Yes, I was satisfied, I was well satisfied. They was the one that wasn't satisfied.

Q. Well, you don't understand my question, on the basis of the medical report Swift and Company were still unwilling to take you back?

A. That's right.

Q. And you made some comment that you wanted further medical and the union agreed to let you pick a doctor, didn't you?

A. No, sir, I didn't make any comment that I wanted further from no doctor, I was well satisfied, I figured if five or six doctors couldn't get me back to work, it wasn't no use going and getting no more.

Q. What doctors are you talking about, now?

[fol. 93] A. I am talking about that same doctor's statements.

Q. You are talking about these statements here?

A. Yes, sir.

Q. Didn't the company say in that meeting that they wanted a complete examination and not just merely a blood reading?

A. Well, they had had a—they will regardless of what he said—

Q. Well, wasn't that the position that the company took at this fourth step meeting that they had complete medicals; three and four page medicals on you, isn't that right?

A. Three and four pages.

Q. Yes, didn't Dr. Morris's medical report read about three pages? Wasn't his about three pages long?

A. I remember a long sheet but they didn't use Dr. Morris's statement there in the President Hotel.

Q. The union didn't?

A. The company didn't either because I didn't agree to it.

Q. Well, didn't the company state that these, they didn't consider these medical reports, that these were merely blood pressure readings and they wanted a complete examination?

A. No, he didn't say nothing about that.

Q. How did you happen to go to Dr. Day?

A. Dr. Day!

Q. Yes.

A. I went there because the union told me to, I never [fol. 94] heard of Dr. Day.

Q. Don't you recall a conversation—

A. No, sir, not with no Dr. Day. The union asked me—

Q. Mr. Owens, I haven't asked the question yet.

A. O. K. I am sorry.

Q. Don't you recall a conversation with Mr. Jamerson where you were dissatisfied and he said, "Mr. Owens, you pick a doctor of your own choosing and the union will foot the bill." Do you remember that conversation?

A. Well, that was their idea, not mine, that was their idea, not mine, I was just only trying to go along with them, that's all. They claimed that's how come they hadn't got me back to work because I wouldn't go along, I was trying to go along with these people.

Mr. Panethiere: Your Honor, I ask the answer be stricken as not responsive.

The Court: It was not responsive to the question.

By Mr. Panethiere:

Q. Just answer the question.

Mr. Browne: What was the question? I have forgotten.

By Mr. Panethiere:

Q. The point I was trying to establish, Mr. Owens, is that the union wanted more medical in order to try to help you get your job. Isn't that right? That's right, isn't it, Ben? They were trying to help you, weren't they?

A. Not in my book, no.

[fol 95] Q. Didn't they—did you pick Dr. Day as the doctor to go to?

A. No, I didn't know nothing about Dr. Day. I picked Dr. Hesser, I picked Dr. Hesser.

Q. I am talking about after the fourth step.

A. I am talking about after the fourth step.

Q. Did you go to Dr. Hesser after the fourth step?

A. Yes, I did.

[fol 96] heard of Dr. Day.

Q. Did you have some medical from Dr. Hesser after the fourth step?

A. I went to Dr. Hesser and I told him, you know, I wanted to go through another examination with him, the union was requiring me to go to a doctor and get another, a real examination. Here's the words that Dr. Hesser told me, he told me, he says, "I can't myself," he says, "because I am not that type of doctor," he say, "I am a surgeon doctor," he say, "I'm a surgeon doctor, but," he says, "I will pick you a good doctor." And so I let it go from there.

Q. Who did he pick?

A. He picked Dr. Day.

Q. All right. That answers my question. The union had nothing to do with picking Dr. Day, did they? It was a doctor that you selected as a result of, by a recommendation of a doctor in whom you had confidence?

A. That's right.

Q. Dr. Day is a recognized doctor who limits his practice to heart diseases, doesn't he?

[fol. 96] A. That's right.

Q. All right. And the union representative went down there with you when you were examined?

A. That's right.

Q. And they paid the bill, didn't they?

A. I guess they did. I didn't.

Q. And you were informed of the results of that examination, weren't you? Did they tell you what Dr. Day's report stated?

A. Yes, I think Manuel—

Q. Manuel and Leonard showed you the report when they received it. I will ask you to read that. Do you need some glasses again?

A. No, that's O. K. I am acquainted with it.

(Defendant's Exhibit No. 18 marked for identification)

By Mr. Panethiere:

Q. This is Dr. Day's report of February 6, '61.

A. Yes.

Q. That is the report he made as a result of examining you, you just saw him one time, right?

A. That's all, I just saw him one time.

The Court: You are offering that in evidence?

Mr. Panethiere: I offer it in evidence at this time, Your Honor.

The Court: It will be received.

[fol 97] (Defendant's Exhibit No. 18, so offered and received in evidence, is not included herein, but will be filed separately)

(Defendant's Exhibit No. 18 was read to the jury by counsel)

By Mr. Panethiere:

Q. Now, Ben, you remember the fourth step?

A. I remember the fourth step.

By Mr. Panethiere:

Q. What did you understand was the result of the fourth step meeting, Ben?

A. Understand at the fourth step meeting?

[fol 98] Q. Yes.

A. Well, they came up, the union was going—I went through with that.

Q. What do you mean, you went through with that?

A. I went through with the rehabilitation.

Q. You went through with the rehabilitation?

A. That's right. I went through with it afterward I wanted to see what they was talking about, I went to a man called Mr. Beck on the fourth floor in the old Brotherhood

Building on Minnesota and asked him about this deal, this rehabilitation, the time they laid it down to me. I went and talked to a man called Mr. Beck and I talked to a lady out to the Kansas University concerning this rehabilitation. She says that was for people that was completely damaged.

Mr. Browne: Told her what?

A. Was completely, couldn't do nothing, blind people, people paralyzed, completely paralyzed.

By Mr. Panethiere:

Q. My question was this, Mr. Owens, there was some discussion about sending you to the heart association?

A. That's right.

Q. But you don't remember the discussion about Social Security?

A. That come up later.

Q. When did it come up later?

A. That come up, they had two going on at the same time, Mr. Mooney was representing—was representing the rehabilitation, Manuel Vaca was representing Social Security. And here's what I told Vaca—here's what I told—

Q. May I interrupt you just a minute?

A. O. K.

Q. We are talking about one meeting though, aren't we?

A. One meeting.

Q. You are just saying they came up at different times?

A. No. No. No, my social security wasn't mentioned in the fourth step meeting.

Q. And you say Mr. Vaca was opposing social security?

A. He was representing social security. Here's what and also one of the company officials, he told, here's what he told me, he said, "Go ahead on up there and get your social security." Here's what I told him, I said, "O. K., put it down in black and white and sign it," I say, "I can't just walk up there on my own and tell that man that I want my social security," I say, "put it down in black and white and

sign it. Swift and Company sign it, the union sign it, and I will go." I wasn't going to put myself in the middle.

Mr. Browne: Did they do it?

A. No, they didn't do it. They wouldn't sign nothing.

[fol. 100] By Mr. Panethiera:

Q. Getting back to the fourth step meeting when you left that meeting what did you understand, Ben?

A. Represented the heart association will teach me how to work, could learn me, you know, learn me a trade, they going to give me some money, they going to give me some money.

Q. What did you tell the union at that meeting?

A. What did I tell the union?

Q. Yes.

A. At that particular time I didn't say anything.

Q. Have you ever had any discussion with any of the members of the union after that time?

A. Yes, sir.

[fol. 101] Q. When was the next time that you talked to somebody about it?

A. Approximately about two weeks later.

Q. All right. What was the nature of that discussion?

A. The nature of that discussion?

Q. Yes.

A. They said "We going to take you to the heart association." Well, I was under one heart association. They say, "We going to take you to a heart association." I say, "What heart association you going to take me to?" They didn't answer that. They said, "We also going to give you some money."

Q. Who were you talking to?

A. I was talking to Mr. Manuel and Mr. Mooney.

Q. Mr. Mooney. All right. Were you already in one heart association?

A. Well I was under the heart association out to K. U. Medical Center.

Q. And you stated you had been treated out there?

A. I have been treated out there.

Q. How long have you been treated out there?

A. I have been treated out there off and on ever since '56.

Q. That is for a heart condition, right?

A. That's right.

Q. You were in the cardiovascular section out there?

The Court: You must answer, please.

[fol. 102] A. Yes.

By Mr. Panethiere:

Q. About two weeks after the fourth step meeting, which was November 16, 1960, you had a conversation with Mooney and Vaca?

A. That's right.

Q. They were talking at that time about rehabilitation, is that right?

A. Rehabilitation.

Q. Did you have any discussion with the union after that time?

A. Yes.

Q. When was the next time you talked to them?

A. Well, I talked to them every week, every two weeks or, you know, like that.

Q. Now, you remember that the meeting was November 16, 1960?

A. That's right.

Q. Prior to that time you had already engaged an attorney, hadn't you?

A. Yes, I had.

Q. When was the first time you talked to Mr. Browne?

A. When was the first time I talked to Mr. Browne?

Q. Yes, about your discharge?

A. I believe it was somewhere along, approximately about October.

Q. Could it be as early as September?

A. It could have been.

Q. And that was even before the fourth step had even been set and a date agreed upon, wasn't it? Now, were you [fol. 103] unhappy with the union at that time?

A. I was unhappy with the union.

Q. All right. For what reason were you unhappy with the union at that time?

A. Because they talked mean to me, I asked them things and they would quarrel at me and they told me that they couldn't do me no good, and so, and I was very displeased with them.

Q. And were they, at these various steps in the meetings, trying to get your job for you, up until the fourth step?

A. Up to the fourth step?

Q. Yes, were they trying to get you back to work then?

A. Well, they said they was.

Q. All right. Now, who talked mean to you?

Mr. Browne: You interrupted his answer. He said they said they was but then you interrupted him. Now I would like the Court to permit him to finish his answer.

Mr. Panethiere: I thought he was through.

By Mr. Panethiere:

Q. Go ahead.

A. They talked mean to me when I would go in there to talk to them, "I can't get you back to work with all that old high blood pressure you got," this doctor says so and so, Dr. sent a statement in there for one thing on it, they claimed that the doctor was wrong.

Q. Who?

A. Mooney, Manuel.

Q. When was that?

A. It happened somewhere along, you know, around in [fol. 104] August, that's just about when things, you know, got started.

Q. Basically, as I understand—

A. Well, I was under the heart association out to R. H. Medical Center.

A. From January up to August, nobody moved a hand, from January to April, the case was turned over to the union January the 11th, until August the 8th nobody turned a hand.

Q. During that time is when you were getting these medical reports, was it, Ben, the union told you that in order to do you some good you were going to have to have some medical to back you up? Isn't that what they told you, Ben?

A. Yes.

Q. That's absolutely right, wasn't it?

A. Yes, that's what they told me.

Q. Now, how many times have you talked to—Mr. Vaca, was he elected president just about the time you were discharged, wasn't he, or shortly before that?

A. No, Mr. Vaca didn't take his seat until July the first of '60.

Q. Of '60. You had already been terminated?

A. I was already terminated.

Q. Now, how many times did you talk to Mr. Vaca while he was in the office?

A. Oh, I didn't see—I talked to him several times, he was kind of hard, you know, for me to tell you just exactly how [fol. 105] many times that I talked to him.

Q. More than one time you talked to him?

A. Oh, yes.

Q. It was always about your pending grievance?

A. That's right.

[fol. 107] Q. Now, you made the statement on direct examination something about Mr. Vaca mentioned \$300.00 when you were in the union hall there, when you mentioned going to the fifth step.

A. No, we wasn't in the union hall.

Q. Where were you at that time?

A. Out there on the, I was sitting out there on the rail when he came by and I asked him was he going to represent this case to the union hall, he said no—

Q. Would that be just two weeks after the fourth step you are talking about now? When was it? I am trying to place the time, Mr. Owens.

A. It was somewhere in the neighborhood but I keeps no records.

Q. Yes, sir, in the neighborhood of what? [fol. 108] A. Maybe it was a week, maybe two weeks, could have been less, could have been more.

Q. All right.

A. Four years is a long time.

Q. That's the first time you saw Mr. Vaca after the fourth step. Was this the first time you talked to him after the fourth step meeting?

A. No, no, I think I talked to him before then.

Q. Well, if I understood you correctly when I asked you you said that the first conversation you had with any union official was about two weeks after the fourth step meeting.

A. That's right. It could have been more, could have been less, but as I said, four years is a long time to remember.

Q. No, I am saying about two weeks, more or less?

A. Yes.

Q. All right. And who was the first man you talked to after the fourth step meeting?

A. After the fourth step meeting?

Q. Yes.

A. I walked in the hall—

Q. The union hall?

A. In the union hall—

Q. All right.

A. And it was a bunch of them in there.

Mr. Browne: I didn't get the answer, "and it was a [fol. 109] bunch what?"

Mr. Panethiere: "bunch of them in there".

By Mr. Panethiere:

Q. Do you recall who was present? Was Mr. Vaca there?

A. Mr. Vaca was there.

Q. Mr. Jamerson there?

A. Yes, I know Mr. Jamerson was there.

Q. How about Mr. Mooney, the gentleman—

A. I don't—

Q. You don't remember whether he was there or not?

A. I think Mr. Mooney had gone back to work.

Q. And what was the nature of your conversation at that time?

A. When I walked in, Mr. Vaca mentions, he says, "There is the man. I am really glad to see you."

Q. What else did he say?

A. He says, "We want to take you to the heart association," he said, "the heart association." He says, "Whatever those doctors says," he says, "that's what, that's what will be done."

Q. All right. Did you agree to go to the heart association?

A. No, I didn't.

Q. You refused to go; didn't you? That's what happened, wasn't it, Ben?

A. Yes.

Q. All right. What was the rest of the conversation that first time now after the fourth step, what was the rest of the conversation?

A. They says that, told me—of course, Mr. Mooney was [fol. 110] with me at that time, he stopped that conversation there.

Mr. Browne: Mr. who was there?

Mr. Panethiere: Mooney.

A. The next time I met—

By Mr. Panethiere:

Q. I am not talking about the next time. I am still talking about the first time, Ben. Is that all that was said this first time, talked about the heart association, you refused to go, is that right?

A. I didn't refuse it right then.

Q. You just let the matter drop, didn't give them an answer?

A. I didn't give them a direct answer, I didn't tell them I would go, didn't tell them I wouldn't go.

Q. Then was that the end of that meeting? Is that what you say? Or did you have some further conversation at that first meeting?

A. No, that just about took right then.

Q. That's all you talked about?

A. That's right.

Q. At that time you didn't say anything about the fifth step, did you?

A. No, not right then.

Q. Now when is the next time you saw any—

A. I met Mr. Vaca and I told him that I wasn't satisfied that the heart, you know, to go in to no heart association, and they was promising me money, and I asked him how [fol. 111] much money, I said, "How much money you going to give me?" I says, "What you giving me money fer?" I said, "What do you give me," I say, "do you owe me any money?"

Mr. Panethiere: I don't understand.

(Answer read by the reporter.)

The Court: Mr. Panethiere, I do not like to interrupt your cross-examination, I assume you have some more.

Mr. Panethiere: Yes, sir.

The Court: I would like to recess now.

(Whereupon, the jury being duly admonished, an adjournment was taken until 9:45 A.M., June 19, 1964.)

[fol. 112]

Friday, June 19, 1964

Morning Session

Mr. Panethiere: Your Honor, another named defendant, Manuel Vaca, was unable to be here yesterday, but he is present in the courtroom this morning.

BENJAMIN OWENS resumed the stand.

[fol. 114]

Cross examination (continued).

By Mr. Panethiere:

Q. Mr. Owens, when we adjourned yesterday we were at the point after the fourth step meeting. You said approximately two weeks later you first contacted Mr. Vaca with reference to your grievance, is that correct?

A. That's correct.

Q. You will have to answer.

A. Yes.

Q. What was the nature of your conversation with Mr. Vaca at the first meeting after the fourth step?

A. The conversation between me and Mr. Vaca, he was still talking about this rehabilitation.

Mr. Browne: A little louder, please.

A. He was still talking about rehabilitation and this heart association deal that they had going.

By Mr. Panethiere:

Q. Now, this was probably sometime in November of 1960, is that correct?

A. Yes, that's right.

Q. And when is the next time you contacted Mr. Vaca or any member of the union with reference to your grievance?

A. Well, let's see, about somewhere along about the first of December as near as I can remember.

Q. About the first of December of 1960?

A. Yes.

Q. And who did you talk to?

[fol. 115] A. Well, I talked to Mr. Jamerson and I talked to Mr. Manuel.

Q. Mr. Manuel, you mean Mr. Vaca here (indicating)?

A. Mr. Vaca.

Q. Where was this conversation held?

A. That was in the union hall, it was a round, round table discussion.

Q. And what was the nature of that discussion, Mr. Owens? What did you talk about?

A. Well, still talking about the rehabilitation and this here—the heart association.

Q. And did you ever, at that time you hadn't requested going on to the fifth step yet, had you?

A. No.

Q. I see. Now, did you have a meeting with any members of the union after the first part of December, 1960?

A. 1961?

Q. Yes, in '61 did you have any discussions with them?

A. Yes.

Q. When was that, approximately, as near as you can remember?

A. Somewhere along about in January.

Q. Do you know whether it was the first part of the middle or the last part?

A. It was probably along the middle.

Q. The middle of January, 1961? Where did that meeting take place, Mr. Owens?

[fol. 116] A. I met Mr. Manuel out, I was out there sitting on the rail out there between the second house and the union hall, and when I—when I approached him.

Q. All right, you approached him and what was the nature of your conversation or discussion? What did you talk about?

A. Well, we talked about—not the next time that I talked to him, him and Mr. Mooney was going in together.

Q. In to the union hall?

A. No, they was off at lunch, they was leaving the union hall and they was going back to work and I approached out there in the front.

Q. Mr. Mooney and Mr. Vaca here (indicating)?

A. That's right.

Q. What was the nature of your conversation at that time? Would you tell it?

A. Well, they got on me about this here heart association again.

Q. They got on to you about it?

A. Yes. That was the nature of the case.

Q. Now, even at that late stage you still hadn't been talking about the fifth step, you were still talking about rehabilitation, weren't you?

A. Yes.

Q. Isn't it a fact that there had been appointments made for you to go to the rehabilitation center for an interview [fol. 117] and that you failed to keep those appointments?

A. They never did make no appointments.

Q. You are testifying there was never any appointments made for you?

A. There was no appointment made.

Q. Either to go to social security, heart association or rehabilitation?

A. Not no directly appointment.

Q. What do you mean by—

A. They never set no date to me how we was going or when we was going or so on.

Q. But there was some discussion about it?

A. Yes.

Q. Now, when is the first time after the middle of January, '61 that you indicated to the union that you desired to go to the fifth step?

A. That run along somewhere along in about the last of January.

Q. The last of January. Now, one point after the fourth step isn't it a fact, Mr. Owens, that you told Mr. Vaca here

that you were very pleased on the efforts they were making on your behalf?

A. No, sir. No, sir.

Q. You never made that statement?

A. No, sir. No, sir.

Q. Going back a little now, Mr. Owens—when were you [fol. 118] informed or when did you learn that the union did not desire to take your grievance to the fifth step?

A. As near as I can remember it was somewhere along just about between the last of January or the first of February as near as in my recollection.

Q. Now, prior to the time that you learned that, you had already filed suit against Swift and Company, hadn't you?

A. That's right.

[fol. 119] Q. All right. But that suit against the company is still pending, isn't it? That has never been disposed of?

A. As far as I know.

Q. Now, going back, Mr. Owens, you stated on direct examination when we first started, when you first took the stand here, that—I am quoting your exact words, I think, as near as I could take them down, "I am a high blood pressure patient". Do you remember saying that?

A. I have had it all my life, born with it.

Q. And you also said at the same time, "I just have to take it easy." Do you remember saying that?

A. I have to take it as easy as I can.

Q. All right. But then on the other hand you testified that you took off on May 23rd of 1959 and you were thereafter off work about twenty-six, twenty-seven weeks, weren't you?

A. They made me stay off that long. I wasn't off that long but the doctor just wouldn't let me come back in there.

Q. I say you were actually off work that long?

A. That's right, I was off just about seven months.

Q. For physical reasons?

A. What they said but my doctor didn't say so, my doctor sent me back there in about two months and a half.

[fol. 120] Mr. Panethiere: I move the answer be stricken as not responsive to the question.

Mr. Browne: That's objected to. We feel that that is responsive because he asked him about it and he gave a complete answer.

The Court: That will be stricken.

By Mr. Panethiere:

Q. Mr. Owens, on direct examination you testified that immediately prior to May 23, 1959 that you became exhausted, that you had been working twelve, thirteen and fourteen hours a day, is that correct?

A. Yes, I was feeling awfully bad.

Q. In fact, you were a pretty sick man, weren't you, Ben?

A. Well, I wasn't in bed, I was still going, I could have worked on but I didn't see no sense in going on killing myself unless I had to.

Q. How long had you been working that overtime twelve and fourteen hours a day just prior to May 23rd?

A. Just prior? Off and on ever since I been down there the whole sixteen years, off and on, I said.

[fol. 122] Q. It is possible then that your statement that you worked twelve, thirteen and fourteen hours might be incorrect, is that what you are saying, Benny?

A. I know we worked long hours at that time. Sometimes we worked as low as four hours, we worked all the way from four to fourteen. I am telling you like it is. I didn't say every week or every day so long.

Q. Didn't you say that the reason that you took off work was because you were exhausted?

A. I was exhausted and I felt bad. I would probably have been feeling the same way if I wasn't doing nothing.

Q. So your work had nothing to do with it, is that what you are saying?

A. I said probably, I do feel bad at times when I am not doing a thing. When a man is sick he's just sick.

[fol. 124] Q. Have you made any applications for employment since you were terminated by Swift and Company?

A. Sure I have made application for employment.

Q. Will you tell us some of the places you have applied?

A. I just made that application over here on the river no [fol. 125] longer than Monday and I got turned down on account of the same deal.

Q. You say you got turned down on account of the same deal. Was that because of your physical condition? Was that the reason they gave you?

A. I can't give sufficient reference—I mean reference.

Q. Have you made application and taken any physical examinations in connection with going to work for anyone?

A. I don't try, to be honest with you, I don't try.

Q. What you are saying, Mr. Owens, is that you know that you can't pass the physical examination?

A. No, no, not from no new men, no.

Q. Pardon me?

A. Not from no new people, I wouldn't expect them to and I wouldn't blame them.

Mr. Panethiere: I believe that's all.

Redirect examination.

By Mr. Browne:

Q. Just a few questions in response to those brought out by counsel. He mentions that, passing this thing, asking about your getting in trouble after you were laid off, but he mentions your not passing a physical examination. Now or any time since you were laid off there; you have done this, lifting these heavy sacks—

A. That's right.

Q. —for long hours, have you?

A. That's right.

[fol. 126] Q. And are you in better shape now—

Mr. Panethiere: Your Honor, I object to the form of these questions,—

By Mr. Browne:

Q. —or worse—

Mr. Panethiere: —leading and suggestive.

Mr. Browne: I haven't even finished yet.

The Court: The objection is overruled.

By Mr. Browne:

Q. Are you in better shape or worse, better shape or worse now than when you laid off because you were so tired after working those long hours?

Mr. Panethiere: Well, Your Honor, counsel is testifying.

By Mr. Browne:

Q. Just tell whether you are in better shape or worse now than you were before you were laid off?

A. Yes, I would say so. Also, you know I am five years older than the time now when these people laid me off, I am five years older and I have worked all five of them some place, doing something, there is no way in the world I could take care of my wife and two kids and just sit around and not do nothing.

Q. Let me ask you this. This company doctor that said there was nothing for you to do but to go home and lie in bed and wait till you die—

A. Well, he didn't say wait till I die. He spoke it like this, he says, "I tell you what you do, just as fast as you [fol. 127] can," he says, "You go home and get in bed and stay there and live your life out," I says, "Who going to pay my gas, lights, rent and groceries for the kids, keep the kids in school, and so on while I am laying there living my life out?" It would be very—life wouldn't be there long, you can believe that.

Q. And not following his advice, you wound up four years later in what kind of shape?

A. I wind up two years later, I lose two homes, I lost a new car.

Q. No, I mean physically?

A. Physically?

Q. How do you feel?

A. I feel fine.

Q. During these years when you worked for the packing-house sixteen years and were building up your seniority and so forth and getting near retirement time, I will ask you what kind of sports you engaged in, even though you had this heart murmur from birth, what kind of sports did you engage in?

A. Well, I played ball—

Mr. Panethiere: Your Honor—I have tried not to object to this line of questioning but it is immaterial and irrelevant to the issues we have in this case, Your Honor, what his physical condition is, that has nothing to do with the issue in the case here, Your Honor. The issue is not whether or not he is physically able or not but whether or [fol. 128] not the union actually was in good faith in processing his grievance.

Mr. Browne: Whether he was in good condition shows whether they acted in good faith or not.

The Court: Overruled.

By Mr. Browne:

Q. What did you do, now?

A. I played ball, I didn't play in no leagues or nothing like that, we go around in the parks and we play ball.

Q. What kind of ball did you play?

A. Well, it was soft ball, no baseball.

Q. What position did you play?

A. Well, I catch and play the field.

Q. Run the bases when you are lucky enough to get a hit?

A. Yes.

Q. Did you have any trouble with your heart or any other part of your body?

Mr. Panethiere: Your Honor—I object to these questions.

A. Didn't have a bit. I'd run races and get out and see, you know, how far I could run, or try, you know, like I used to do years ago. Of course, I can't run as far and I can't trot as far now as I did years ago, of course.

[fol. 129] Recross examination.

By Mr. Panethiere:

Q. Ben, I can't understand, you say you took off in May of 1959 because you were feeling bad, you were a sick man, weren't you, in '59?

A. Is there any difference in feeling bad and sick?

Q. Well, is the fact that you took off for approximately six months—

A. I didn't take off no six months, I was off about two months and a half and the doctor wouldn't honestly let me come back.

Q. All right, but you were under medical care at that time, weren't you?

A. I was under medical care as far as that's concerned I have been under it ever since 1956.

Q. And when you did return to work the company doctor was the one that wouldn't let you return, is that right?

A. That's right, the company doctor was the one that wouldn't let me return, nobody but the company doctor.

Q. And the whole matter of the grievance and all the steps had to do with your physical condition, didn't it?

A. That was their job to take care of it. I couldn't do it.

[fol. 134] Q. Do you remember Dr. Day telling you that he couldn't predict life—

A. (Witness shakes head)

Q. Wait a minute. I haven't even asked the question yet, Mr. Owens.

Mr. Browne: I object to counsel calling down the witness.
The Court: Proceed.

By Mr. Panethiere:

Q. You don't remember anything Dr. Day told you?
[fol. 135] A. Dr. Day ain't opened his mouth to me. Believe me, that man ain't opened his mouth to me. He talked to you all, not me. The man ain't said nothing to me. I went in there for the examination, me and Mr. Jamerson and I went, his secretary, his secretary, his nurse, she first, she says, "Is this the man you brought in for examination?" He says, "Yes."

Q. My question is this. Dr. Day didn't talk to you at all?
A. He said not one single word to me, no more than his nurse—

Q. Did he talk to Mr. Jamerson in your presence?
A. Not in my presence.

Q. He didn't?
A. Mr. Jamerson told me about two weeks later that he asked the doctor was I going to live, was there a chance for me to live, and he said Dr. Day told him no, that I didn't have a chance in the world to live. That's been four years, I'm still living.

Q. Now, he said he couldn't predict if you kept on in the same occupation, isn't that what he said, Ben?

A. Same occupation?
Q. Yes, if you continued your job at Swift and Company, he couldn't make any prediction?

A. What's the difference in Swift job and any other old hard job?

[fol. 137] Q. Weren't you charged with the responsibility of making different cuts on the meat different times?

A. At different times?

Q. Yes, didn't you have to cut some of the meat?

A. Yes, I had, I trimmed loins up for them about, about fifteen years.

[fol. 138] Q. And that's what they call a cutter, isn't it?

A. Yes, I was classed as a trimmer.

Q. And where would you do this trimming when you were trimming? Were you in a room, in a cooler?

A. Yes, in the cooler.

Q. Did you work by yourself or were there other people working there?

A. Well, there was other people there.

Q. Doing that work what kind of tool or instrument do you use?

A. I had to have a knife and a hook and a steel, you know, tools like that, to keep my knives sharp.

Q. Do you remember in the grievance steps that all was brought out, what kind of dangerous situation that would be with a man with heart condition, wasn't it?

A. I understand.

Q. You were there, weren't you? You remember that, don't you?

A. Remember what?

Q. That it was dangerous to yourself and to the men around there for a man with a heart condition to work in there, isn't that what they said, Ben?

A. Is it a possibility they have other jobs so I didn't have to use knives—

Q. That isn't my question, Ben. My question is, isn't that what they were discussing and wasn't that one of the topics [fol. 139] in all of these grievance meetings?

A. I heard Mr. Sharp state that.

Mr. Panethiere: I have nothing further.

A. I ain't heard a union man say anything—

Redirect examination.

By Mr. Browne:

Q. Whatever heart condition you had, you had for sixteen years anyway, hadn't you?

Mr. Panethiere: Your Honor, I object to that.

The Court: Sustained.

By Mr. Browne:

Q. I will ask you what kind of heavy work you have done around your home since 1960?

Mr. Panethiere: Your Honor, I object to that as irrelevant and immaterial.

The Court: Overruled.

By Mr. Browne:

Q. That means to answer.

A. I have done everything there such as roofing my house and putting in windows, putting in doors, taking care of the yard, putting concrete gutterings around my house to keep the water from washing the foundations out, and so on, and on top of it I also contract those kind of jobs and still doing it today, the way I make my living.

Q. Have you done any work on trees?

A. Yes, trimmed trees, and haxl, you know, trim trees, cut yards.

Q. You climb trees to do that?

A. That's right.

[fol. 140] Q. At Swifts did you get time and a half for overtime?

A. Yes, they paid time and a half for overtime.

Mr. Browne: That's all.

Recross examination.

By Mr. Panethiere:

Q. I missed one thing in my notes here. Ben, on cross-examination here I took you from the fourth step meeting and all the conversations you have had with the union people, and you enumerated as near as you could what happened, but on direct examination you mentioned something about three hundred dollars. Now, where did that take place? Where did that happen?

A. Out in the front.

By Mr. Panethiere:

Q. Tell us about the three hundred dollars, Mr. Owens.

A. The three hundred dollars, when I come to be dissatisfied with this heart deal.

[fol. 141] Q. When did you become—

Mr. Browne: We object to interrupting the answer.

By Mr. Panethiere:

Q. When did you become dissatisfied?

A. I went and checked, I went out there to the Kansas University and I told them the deal they was giving me down there about the heart association, he said, "What about the heart association?" I said, "They are supposed to take me to the heart association," I said, "they are supposed to pay me some money and," I said, "they are supposed to rehabilitate me for another job," and so on. He said, "Yes, there is such thing as that all right enough but," he said, "as far as the money is concerned we never heard of it."

Q. Now, when was this that you became dissatisfied, about what month, what year?

A. '61, around about the last of January or first of February.

Q. Of 1961? All right. You became dissatisfied, then you went—who did you talk to when this three hundred dollar thing came up that you mentioned?

A. I talked to Mr. Manuel.

Q. Mr. Vaca here?

A. That's right.

Q. You say that was where? Where did that conversation take place?

A. It was out in the front, he was going to work and I stopped him, you know, asked him was he going to represent me through this here fifth step. He said, "No," he [fol. 142] says, "we have got no money, but," he says, "if you have got three hundred dollars that you can let me have," he says, "maybe we can do something about it."

Q. Who was with him?

A. Wasn't anyone with him.

Q. He was by himself? Have you read the union contract?

A. Yes.

Q. Particularly the grievance procedure?

A. Some parts of it, yes.

Q. And you are familiar with the union rules? You say you are a union member?

A. Some of them I am familiar with and some of them I am not.

Q. And do you know by what authority a case is taken from the fourth step to the fifth step?

A. What—

Q. Who makes the decision to take it from the fourth step to the fifth step?

A. The representative or the steward, or somebody.

Q. Have you ever heard of the executive board?

A. The executive board?

Q. The executive board. They have one there at the union, don't they, executive board?

A. I don't know whether they do or not.

Q. You don't know whether or not they take the majority vote of the executive board to take a case from the fourth step to arbitration?

[fol. 143] A. No.

Q. You don't know that. What did you understand this three hundred dollars was for, that you mentioned?

A. Had to pay it to the arbitration.

Q. Had to pay it to who?

A. To the arbitration.

Q. To the arbitrator?

A. Yes.

Q. In other words, the three hundred dollars you say was to pay the arbitrator?

A. Yes, he said that's what it took.

Q. In other words, he said it would cost three hundred dollars?

A. That's right.

Q. He wasn't demanding the money for himself, was he?

Mr. Browne: That is objected to, calling for a conclusion. That is for the jury to decide.

The Court: Ask him what was said. Sustained.

Mr. Panethiere: All right.

By Mr. Panethiere:

Q. Now, are you familiar with the contract provisions on how arbitrators are paid?

A. No, I ain't.

Q. What did you tell him about the, when he said he wanted three hundred dollars?

A. I told him I didn't have any three hundred dollars.

Q. Did he tell you at any time, or did he mention to you that the union's position was that they had done all they could and that they didn't think your grievance had any [fol. 144] merit?

A. Union had done all they could? You say did he tell me that at any time?

Q. Yes.

A. No.

Q. He never did tell you that?

A. No.

Q. Did he ever tell you that they felt the union's position was that the grievance was not arbitrable because in their opinion it didn't have merit?

A. What you mean by the merits?

Q. That they thought they couldn't win it. Did they tell you they couldn't win the case in arbitration?

A. Yes, I do remember telling me that.

Q. They told you that on numerous occasions, didn't they?

A. I remember him telling me that one time.

Q. Was that before or after the alleged three hundred dollars?

A. Along about the same, along somewhere along about the same time.

[fol. 145] Mr. Panethiere: Nothing further.

Mr. Browne: All right. Thank you, Benny.

(Witness excused)

[fol. 147] Mr. Browne: Plaintiff rests.

[fol. 148]

**DEFENDANT'S MOTION FOR A DIRECTED VERDICT AT
THE CLOSE OF PLAINTIFF'S EVIDENCE**

Come now the defendants, and each of them, and move the court to instruct the jury that upon the pleadings and evidence adduced their verdict shall be in favor of the defendants and against the plaintiff for the following reasons:

1. That plaintiff's evidence fails to establish any cause of action against these defendants.

2. That plaintiff's evidence fails to establish a claim upon which relief can be granted in favor of the plaintiff and against the defendants.

3. That plaintiff's evidence does not establish or show any mandatory duty to carry plaintiff's grievance to the fifth step.

4. That plaintiff's evidence does not establish or show that defendant's refusal to carry plaintiff's grievance to the fifth step was discriminatory, malicious, or done in bad faith.

5. That plaintiff's evidence does not establish or show that any actions on the part of these defendants were arbitrary, malicious, wrongful, capricious, wanton or unlawful.

6. That plaintiff's evidence does establish and show that there are five steps to the arbitration procedure which was referred to in plaintiff's petition and his evidence, and that the plaintiff refused to cooperate and sought legal counsel [fol. 148a] prior to the fourth step; that as a consequence thereof the plaintiff failed to exhaust his internal and contractual remedies and this action is therefore prohibited and barred, and this court does not have jurisdiction over the subject matter of plaintiff's alleged cause of action herein.

7. That plaintiff's evidence shows and establishes that the essence of plaintiff's cause of action is arguably and basically an allegedly unfair labor practice under the Labor Management Relations Act, as amended, 29 U.S.C. §151 et seq., and especially 29 U.S.C. §158 (b) (1) (A), and as a direct consequence thereof the jurisdiction of the courts of this state over the subject matter of this alleged cause of action is therefore pre-empted and prohibited, and that the exclusive, primary jurisdiction over this alleged cause is properly vested in the National Labor Relations Board, if at all.

8. That plaintiff's evidence shows and establishes that the alleged wrongful conduct on the part of these defendants arose, if at all, on January 8, 1960, and that plaintiff did not pursue his alleged cause of action until February 13, 1962, which was more than two years subsequent to the date of the alleged conduct and as a direct consequence thereof is barred under the appropriate statute of limitations of the state of Kansas.

(Filed June 19, 1964)

The Court: Overruled.

[fol. 149] DEFENDANT'S EVIDENCE.

LEONARD L. JAMERSON was duly sworn:

Direct examination.

By Mr. Panethiere:

Q. Will you state your name, please?

A. Leonard L. Jamerson.

Q. Where do you live, Mr. Jamerson?

A. 3214 Olive.

Q. Kansas City, Missouri?

A. Yes.

Q. Where are you employed?

A. Swift and Company.

Q. How long have you been employed there?

A. Thirteen years and six months.

Q. Were you a business representative when a grievance arose in connection with Benjamin Owens?

A. Yes, I was.

Q. You are familiar with that grievance?

A. Yes, I am.

Q. You know Mr. Owens, do you not?

A. Yes, I do.

Q. Can you tell us what is the first knowledge you had of [fol. 150] the grievance of Benjamin Owens?

A. The first knowledge of Benjamin Owens that came to me, it was in May, what date in May I don't know but that was in, I think it was in '60 or '61, one of those years, and he brought the doctor's statement to me and I think the first doctor's statement was from Dr. Alexander, and, you know, as things go, you look at it and see what you are going to do. So I got his doctor's statement.

Q. Well, what were your duties as representative, Leonard?

A. To file grievance cases.

Q. If a man in the plant had a grievance or felt something was wrong, he would come to you, is that correct?

A. Yes, he would come to me.

Q. Then what would you do with the grievance?

A. I would take it first and I would go to the—well, I can go to the foreman or either the superintendent, I mean the business superintendent, and ask them what's the reason why the man can't come back to work, and he'll tell me why, then I will bring the aggrieved party with me, or he don't have to come with me but I'd like for him to be with me, and the steward be with me too, so after we get that all straightened up and everything, then if the aggrieved party is not satisfied what's going on, you know—

Q. Just explain it the best you can:

[fol. 151] A. So what I done then, I take it out to the union hall and we'll write it up. That was the first time I ever written, Ben Owens.

Q. You wrote the grievance for Ben Owens?

A. Yes, we write under certain paragraph why the man—why we feel like the man should come back to work, or like that, that's in order to get it going because you don't know what you got until we get into it, see, so—

Q. What happens to it after the grievance is filed?

A. I get a copy, the company get a copy and the union get a copy.

Q. Then thereafter follow the grievance procedure set forth in the contract?

A. That's right.

Q. That's what you call the five step procedure?

A. Yes, start on those steps right there.

Q. And after Mr. Owens's grievance was written up, what happened to it?

A. The second step, we take it then to the second step, you know.

Q. Were you present when the second step meeting was held?

A. Oh, yes, yes, yes.

Q. Do you recall who else was present?

A. Oh, boy. Now, I know Sharp was there.

Q. Who?

A. Ernie Sharp, he was there, I was there, the steward was there, yes, the steward was there.

[fol. 152] Q. Mr. Jamerson, I can't find the exhibit. You recall being present at that meeting?

A. Oh, yes, I was there.

Q. What was the union's position with reference to Ben Owens's grievance?

A. As I say, I am not—I just can't say I am going to try to say word for word, it's been so long ago.

Q. The best you recall.

A. Well, I sit down and I talk, you know, I mean I just tell the company how I feel about it.

Q. Well, how did you feel about Ben Owens's grievance?

A. Well, the way I felt about it was like this, that the doctor's statement that was first brought to me, you know, to be seen, it didn't say nothing about going back to work or anything like that. That's what we were—when the first statement came, it was about—it was about his heart, if I am not mistaken, that was the first thing that was about his heart, it was high blood pressure, high blood pressure, went out with high blood pressure, came back in, his high blood pressure was supposed to be down to a certain degree, see, so this doctor's statement—

Q. Well, Leonard, my question is this. The union was representing Mr. Owens at the second step, wasn't it?

A. That's right. That's right.

[fol. 153] Q. And what was the company saying?

A. The company was refusing him to come back to work.

Q. And what was the union trying to do?

A. Get him back to work.

Q. All right. And what position was the company taking? What were they saying the reason Ben should go back to work?

A. You mean what was the company saying why Ben should go back to work?

Q. What was the union saying why he should be put back to work?

A. I was just saying he should be put back to work because I just felt like the man should go back to work, that's the way I felt about it, because like I say, I am no doctor or nothing, I was just going by the report that was brought in to me.

Q. Now, Mr. Jamerson, I hand you what has been marked for identification as Plaintiff's exhibits 1 and 3. Do those look familiar to you, or copies of those?

A. Yes, I remember this one here (indicating). I remember this one (indicating).

Mr. Browne: Just for the record, he is pointing to Dr. Alexander's dated 5-19-'60, Exhibit 1. O.K.?

Mr. Panethiere: One.

A. I don't remember all of those. I recognize this one (indicating). I remember this one (indicating).

[fol. 154] By Mr. Panethiere:

Q. You are talking about Dr. Hesser's report?

Mr. Browne: That would be—

Mr. Panethiere: March 30—

Mr. Browne: March—

Mr. Panethiere: March 24, 1960.

Mr. Browne: March 24, 1960, Exhibit 3. O.K.

Mr. Panethiere: Your Honor, I think Mr. Browne will have an opportunity to cross-examine later on.

Mr. Browne: Oh, all right. I thought maybe I could be helpful.

A. No.

By Mr. Panethiere:

Q. But on the basis of the medical that you remember that was presented—there were medical records presented both by the company and the union, weren't there?

A. Medical report by the company?

Q. Didn't the company have some medical reports in connection with Ben Owens?

A. I think so. I think they had one, it didn't look good.

Q. All right. So what was the result of the second step meeting, after you had your discussions, what happened?

A. Well, I didn't like the way things were going so I said, "Well, O.K., I'm just going to file the third step." That's what I did.

[fol. 155] Q. You couldn't accomplish anything in the second step?

A. Didn't accomplish nothing.

Q. All right. And Mr. Mooney was present with you at the second step, wasn't he?

A. Let's see, now, I think it was the third step when they, when the vice-president, I think it was the third step.

Q. I hand you what has been marked as Defendants' Exhibit No. 17 and I will ask you to read that, Leonard.

A. Read out loud?

Q. No. Read it to yourself.

A. Yes, sir. I remember that.

Q. Those are the notes of the meeting of the second step, are they not?

A. Yes, sir, I remember that.

Q. Does that correctly reflect about what happened at the second step?

Mr. Browne: That is objected to as self-serving and hearsay. This is in the defendant's case now he is talking about, bolstering up his own testimony, testifying from hearsay.

Mr. Panethiere: Your Honor, it has been introduced.

The Court: Overruled.

By Mr. Panethiere:

Q. In other words, that's about what happened at the second step?

A. That's right. That's right.

[fol. 136] Q. Now, were you present at the third step meeting?

A. Yes, I was there on the third step.

Q. To make it short, about the same thing happened?

A. Same thing happened, that's right.

Q. Then it was decided to take it to the fourth step?

A. Then I wasn't satisfied there, I went back to the union hall and written up, you know, we have our meeting, then I make the recommendation that it be moved up to the fourth step and it was so it went up to the fourth step.

Q. Were you present at the fourth step meeting?

A. I was there at the fourth step.

Q. After the fourth step meeting was completed, did you have some conversations with Mr. Owens about his grievance?

A. We always talked, all the time, talked all the time.

Q. Now, do you recall going with Mr. Owens to see a Dr. Day?

A. Yes, in the Brotherhood Building.

Q. Brotherhood Building?

A. Yes.

Q. Can you tell us how that came about that you went with Mr. Owens over to see Dr. Day?

A. Yes, I remember that, I remember that good. I was working, the union called me out there, that they wanted me to go with Ben Owens to his doctor and before I even went into the union hall I done asked him what doctor we going to, "I am not going to tell you, I am not going to tell you, I am going to take you to this doctor here."

[fol. 157] Q. That's what Mr. Owens told you?

A. Yes, that's what he told me. All right. So I go to the union hall there and I tell the president what my purpose is and everything, I am going with Ben Owens, I didn't have no car myself so I went with Ben in his car up in the Brotherhood Building, I didn't know where I was going, that's true, I didn't know where I was going, so we goes in this building and goes up there to Dr. O'Day, Dr. O'Day, I told him who I was, I told him I was union

representative for our local, and everything, so he says, "O.K." So he told Ben, he said, "Go in that room in there", and he sat down and I sat down in his office. All right. The man come out then, this doctor.

Q. Did the doctor examine Ben Owens?

A. I assume he did because he went in this room back there in that examination room. He comes out and Ben Owens comes out—

Q. Who came out? Owens?

A. Doctor and Ben Owens, both of them came out. Ben was fastening his shirt up and everything so the doctor was standing in front of me and Ben Owens standing at the side of me and I just can't say the words the doctor told me, "This man is not able to work," he said, "I will help him to get some type of aid," or something like that, he said, "I will help him." I said, "Will you write that in a [fol. 158] letter in effect for the union?" He said, "Yes," he said, "Who shall I address it to?" I told him to address it to the union hall and myself, you know. So he written all that down, sealed it up and mailed it to the union hall. All right. Then we had our meeting. All right. The letter was opened up and—

Q. Let me interrupt you just a minute. You said you had your meeting. Now, what meeting are you referring to there?

A. Our board meeting.

Q. That's the executive board meeting?

A. Yes.

Q. How many men on the executive board?

A. Twelve—well, twelve representatives and the treasurer and the vice president and the president, let's see—wait a minute—the president, vice president, secretary, treasurer.

Q. That would be sixteen?

A. Sixteen, yes.

Q. All right. And you say at the board meeting this letter was opened?

A. It was opened there at the board meeting.

Q. It hadn't been opened prior to that?

A. No.

Q. All right. What happened at the board meeting when Dr. Day's letter was opened?

Mr. Browne: A question as a basis for objection. Was Mr. Benny Owens in the room during that time?

The Witness: Was he present? No.

[fol. 159] Mr. Browne: Then we object to that, calling for hearsay.

The Court: Are you asking for the conversations?

Mr. Panethiere: No, just what transpired, Your Honor.

The Court: Overruled.

Mr. Browne: I suggest nothing could happen—

The Court: I will sustain it as to any conversations.

By Mr. Panethiere:

Q. Mr. Jamerson, I hand you what has been marked as Defendants' Exhibit 18 and ask you if that was the contents of the envelope that was opened at the board meeting? Is that the letter from Dr. Day?

A. Yes.

Q. Now, what is the date on that letter?

A. February 6, 1961.

Q. Now, after the letter was opened, was there some discussion as to Benny Owens' case, without relating the conversation, was there some discussion about Ben Owens?

A. Yes. Yes.

Q. All right. And what did the board decide to do about Ben Owens?

Mr. Browne: Wait a minute, now, that would be calling for hearsay and we object to it, it was out of the presence of Benny Owens.

[fol. 160] Mr. Panethiere: All I am asking, Your Honor, is—

Mr. Browne: Unless it is some official record.

The Court: Your objection is it is not the best evidence?

Mr. Browne: Yes.

The Court: Well,—

Mr. Browne: Hearsay.

Mr. Panethiere: He can testify as to what the—

The Court: If he knows. Overruled.

By Mr. Panethiere:

Q. Do you know what the board decided to do about Ben Owens? You were a member of the board, weren't you?

A. Yes. After we got through, after the letter, was all read and everything, then—

Q. Not the conversation, I don't want the conversation. What did they decide to do about Ben?

A. Well, after that, we had a, we had a meeting at the President Hotel then because we was talking about taking it to—let's see; wait a minute—I know we had a meeting at the President Hotel.

Q. That's the fourth step you are talking about?

A. The fourth step.

Q. I am talking about your executive board meeting when you opened this letter, Leonard.

Mr. Browne: We object to counsel trying to impeach his [fol. 161] own witness. He has already testified they held the fourth step at the President Hotel after that meeting.

The Court: Overruled.

Mr. Browne: Now counsel is trying to change that.

The Court: Overruled.

A. Well, we talked on, we talked on this letter, I tell you that. We talked on it.

By Mr. Panethiere:

Q. My question is simply this, Leonard. After you talked and had conversation back and forth, what did the executive board decide to do about the Ben Owens case? Did they decide to go to the fifth step?

Mr. Browne: Now, that's objected to as leading and suggestive,—

Mr. Panethiere: Your Honor,—

Mr. Browne: —putting the answer in the witness's mouth.

The Court: Overruled.

By Mr. Panethiere:

Q. Let me ask one question, Mr. Jamerson, are you here under subpoena?

A. Yes, I am.

Q. You were contacted prior to this trial, were you not?

A. That's right.

Q. And asked, requested to be here, and you refused, didn't you?

A. Yes, I did.

Mr. Browne: Now, we object to his impeaching his own [fol. 162] witness.

Mr. Panethiere: Your Honor, I would like to qualify this man as a hostile witness.

Mr. Browne: No showing of that at all.

The Court: Overruled at this time. I overruled the objection as to your last question.

A. Well, I tell you, we talked, and I made a motion that this case be sent to the fifth step.

Mr. Panethiere: All right.

Mr. Browne: To which step?

A. Fifth step, I made a motion on that and it was seconded.

By Mr. Panethiere:

Q. It was seconded?

A. Yes, it was.

Q. Then what happened? What was the result and what did the board decide to do?

A. Then that's when they—they didn't know whether to take it or not because all these medicals and everything,

they didn't know what the outcome, see, because the—all that.

Mr. Panethiere: I am not asking for the conclusion.

Mr. Browne: Just a minute. We object to counsel interrupting the answer that way.

The Court: Overruled.

Mr. Panethiere: It was not responsive.

By Mr. Panethiere:

Q. Then you moved that they take it to the fifth step, and you had a second?

A. Yes.

[fol. 163] Q. Did you have a vote on it?

A. Oh, yes.

Q. What was the result of the vote, Mr. Jamerson?

A. To go, to take it on to the fifth step.

Q. At that meeting it was decided to take it to the fifth step?

Mr. Browne: He has already said yes. We object to counsel trying to get him to change it.

Mr. Panethiere: Your Honor, I object to interruption here.

The Court: Overruled.

A. When I made my motion, it was seconded.

By Mr. Panethiere:

Q. All right.

A. All right. Then after it was seconded then we had a discussion on it.

Q. All right.

A. That's right.

Q. How many voted to take it the fifth step and how many voted against it, as you remember?

A. I—

Q. Did the majority vote to take it to the fifth step or vote against it?

A. I can't recall, I just can't recall.

Q. So you don't know. To your knowledge was it ever taken to the fifth step?

A. No.

Q. Now, after that meeting did you have any conversations with Ben Owens?

A. Always had conversation with him because he come [fol. 164] over to the hall there and I talked with him.

Q. Did you ever have any conversation with him about going to the heart association and applying for social security?

A. Yes, I talked to him about that.

Q. And you offered to help him, didn't you?

A. I offered to help him, that is right.

Q. Did you have any conversation with him after the fourth step and he thanked you and he said he thought you did all you could for him?

A. Yes, he did, he told me that, yes, he did.

Q. Did he ever express to you any dissatisfaction with the manner in which this case was handled?

A. He always told me I was his friend always.

Mr. Panethiere: Thank you. No further questions.

Cross examination.

By Mr. Browne:

Q. And you thought he was right, didn't you, Mr. Jamerson?

A. Thought Ben was right by telling me that?

Q. No, no, of course, by saying that, but I am talking about that he should have been taken to the fifth step to give him a chance to present his case, didn't you, you favored that, didn't you?

A. Yes, I was representing him.

Q. That's what I say.

A. I was representing him.

Q. Of course, that's the job of the union, isn't it, to try [fol. 165] to do the best they can for its members?

A. That's true.

Q. And especially against management? Isn't that why you have the labor union?

A. That's right.

Q. That's why you belong to one, isn't it, because you think that the men should have representation?

Mr. Panethiere: Just a minute. He hasn't answered your question yet.

A. I belong to the union because—

By Mr. Browne:

Q. To help the members?

Mr. Panethiere: Let him answer.

Mr. Browne: Be quiet.

A. Like I say, now coming up, the little statement Theodore Roosevelt said, be in a union—it's better to be in a union, in any union, I think that's what he said, that's why I joined the union because I know it's better to be in the union.

By Mr. Browne:

Q. To help the working man, isn't that right?

A. That's what a union is for.

Q. Why, sure. And the union is not, in your view, to try to help the management, the company, but to help the working man, isn't that the purpose of it as far as you know?

A. Well, I say—

[fol. 166] Mr. Panethiere: Your Honor, I object to the question as irrelevant and immaterial, highly improper.

The Court: It may be—overruled.

By Mr. Browne:

Q. Isn't that it?

A. Well,—

Q. One of the main purposes, let's put it that way.

A. You work together, any union and company, they work together.

Q. Yes.

A. That's right.

Q. But when the two interests conflict, the union is supposed to help its own members, is that right?

A. That's right.

Q. So the interests of the company and the union, I mean the employees, do conflict lots of times, don't they?

A. That's right.

[fol. 169] Q. All right. Now, let me tell you—ask you if you didn't know as the union representative that the only step in which the company representative doesn't make the decisions is the fifth step? Right?

A. Say that again.

Q. The company representative makes the decision to put him back to work or not in every step except the fifth step, is that right?

[fol. 170] A. The fifth step is arbitration.

Q. Yes, that's the only one where—

A. The arbitration decides what is final and binding.

Q. So the fifth step is the only step where a neutral person decides it, is that right?

A. That's true.

Q. All right. So actually the board or anybody else for the union as far as you know never decided that Benny Owens was supposed to pay three hundred dollars before you would go to the fifth step, you never heard of such a thing, as a board member, did you?

A. No, I don't remember nothing about that.

[fol. 171] Q. So you felt and so said to the board that he should be put back to work and that the union should back him? Right?

A. You said I said the board—

Mr. Panethiere: I object to that, Your Honor. His statement was that he felt it should go to the fifth step, not that he should be put back to work.

By Mr. Browne:

Q. Is that true?

A. I said take it to the fifth step.

Q. Of course, going to the fifth step, you thought Benny was right or you wouldn't want to represent him?

A. I will tell you why I said take it to the fifth step, that's what a representative do, he puts it in the board's lap, whatever the board decides, you see, it's completely out of your hands then.

Q. I say you felt Benny was right?

A. Yes, if I didn't feel like that I never would have made [fol. 172] a motion, you know, on top of that.

Q. Of course not.

A. I can't just sit here and tell how people are, healthy or anything like that.

Mr. Browne: All right.

Redirect examination.

By Mr. Panethiere:

Q. Now, you stated you didn't know about the state of his health, you just wanted to get the monkey off of your back?

Mr. Browne: Wait a minute. That is objected to, move the answer be stricken.

The Court: Overruled.

By Mr. Panethiere:

Q. You just wanted the arbitrator to take it and let him decide what to do with Benny?

Mr. Browne: Same objection.

The Court: Overruled.

A. Give it to the board.

Mr. Browne: Wait just a minute. Same objection.

The Court: Overruled.

By Mr. Panethiere:

Q. Now, Leonard, do you feel, as the representative, that you did everything that you could to help Ben?

Mr. Browne: Now, wait a minute. That is objected to as invading the province of the jury, calling for a conclusion.

[fol. 173] The Court: Sustained.

By Mr. Panethiere:

Q. Did you perform all the duties incumbent upon you as a union representative?

Mr. Browne: Same objection.

The Court: He may answer.

Mr. Browne: Argumentative.

The Court: Overruled.

A. I may answer it?

By Mr. Panethiere:

Q. Yes.

A. Me?

Q. Yes.

A. I did all what I know what to do.

Q. All right. Now, do you recall having a conversation with Ben where the sum of three hundred dollars was mentioned?

A. I recall the three hundred dollars.

Q. Tell the jury about the three hundred dollars.

A. He told me if I win the case he would give me three hundred dollars. Is that what you mean, like that?

Q. Yes. Is that what Ben told you?

A. I told him, I said, "No, man," I said, "this is my job, I don't take no money." And I have never, and he shouldn't have mentioned that to me.

Q. Where was he when he told you that, Leonard?

A. Out in the street, out there, out in the street.

Q. By the plant?

A. Un-huh.

Q. Do you recall about when that was?

[fol. 174] A. No, I sure can't. It was hot. I know that.

Q. Did he ever tell—state—you were his friend, weren't you?

A. I was his friend.

Q. Did he ever say anything to you about Mr. Vaca demanding three hundred dollars from him?

A. I never heard that. I never heard that.

Q. You were present when Dr. Day made some comments about Mr. Owens's condition?

A. Yes, sir.

Q. Was Mr. Owens present when Dr. Day was talking to you?

A. He was there. He was there.

Q. He was there?

A. When he told me that, I got scared myself.

Q. When he told you what?

A. That the man wasn't able to work, he actually told me that, and Ben Owens was actually standing right there, he said, "Man," he said, "I would help him to get some kind of—"

Q. Did you have any discussion with Dr. Day or did he have any discussion about predicting life and death?

A. Yes, he did, I know he said that his apparatus, he said, "My apparatus is not even high enough for Ben." That's what he said.

Q. When he was taking his blood pressure?

A. I guess so.

[fol. 175] Q. What comments did he make about predicting life and death?

A. He went on to tell a story about a fellow that he turned loose out of his office one time in the same condition with hypertension cardiac, he was a mechanic and he was working under this car and when he would bend down to work on some type of thing on the car, the man dropped dead.

Q. Did he say that that was possible, could happen to Ben if he went back to work?

A. He absolutely did, he just wasn't for it, he just wasn't for the man going back to work.

Q. Now, did Ben explain to you how he happened to pick Dr. Day?

A. Yes, he told me that Dr. Day didn't like the company and he got this doctor, that was his words, I didn't ask him for that.

Q. Did you or to your knowledge did the union have anything to do with selecting Dr. Day?

A. Hun-uh nobody, he selected Dr. Day.

Q. Who paid Dr. Day's bill?

A. The union paid that bill.

Q. Wasn't there arrangements made, Ben had become dissatisfied and they decided to let him pick his own doctor and they would pay the bill?

A. Sure.

Q. You remember that, don't you?

A. Sure, I recall that, I do recall that.

[fol. 176] Mr. Panethiere: I believe that's all.

Recross examination.

By Mr. Browne:

Q. I wanted to ask you about this prediction by Dr. Day that you say occurred that if Benny Owens did hard work he'd die.

A. He didn't say about no hard work. He said if the man went back to work.

Q. What?

A. He said if the man went back to work.

Q. Meaning any work?

A. I guess he was just speaking about down there on the job, I guess.

Q. And that was four years ago?

A. I guess it was four years ago, sometime.

Q. And so if Benny Owens has done any hard work since then, can we agree that doctor was pretty wrong?

Mr. Panethiere: Your Honor, I object. That calls for a conclusion on the part of this witness.

The Court: Sustained.

Mr. Panethiere: He doesn't know what type work this man has been doing or how long he was working, if he had been working.

The Court: I sustained the objection.

Mr. Panethiere: Thank you.

Mr. Browne: That will be all.

(Witness excused.)

[fol. 177]

AFTERNOON SESSION

CALEB MOONEY was duly sworn.

Direct examination.

By Mr. Panethiere:

Q. State your name, please.

A. Caleb Mooney, 2716 Grove.

Q. That is Kansas City, Missouri?

A. Yes.

Q. Are you employed at Swift and Company?

A. I am.

Q. And you are a named defendant in this lawsuit, are you not?

A. I am.

Q. Have you been an officer of the local 12 Packinghouse Workers?

A. I have.

Q. What office did you hold?

A. Vice president.

Q. Are you an officer at this time?

A. Yes, I am.

Q. What is your office now?

A. Vice president.

Q. Do you remember the grievance of Benjamin Owens?

A. Yes, I do.

Q. At that time you were vice president?

A. Yes.

Q. Mr. Mooney, under your collective bargaining agreement do you have a grievance procedure?

A. Yes, we do.

Q. And that is a five step procedure?

A. Yes.

Q. Would you explain briefly to the jury and the Court what those five steps are, how they are handled?

A. Five step grievance procedure, the first step is handled orally with the management, with the foreman; the [fol. 178] second step is in writing and it is held between the two union officers that's listed on the bottom of the grievance sheet and the supervisor or the foreman of that department; the third step is with the general superintendent's office with any three people the union so choose and usually the president comes; and the fourth step your case has to be voted on by the executive board to go to the fourth step, if the board deems that the case has merit that warrants the fourth step they take a vote and the majority can send the case to the fourth step; then if they are not satisfied in the fourth step it is taken back to the board and it is voted on again for the fifth step.

Q. The fifth step is arbitration?

A. Arbitration.

Q. What is the purpose or why do you have five steps, Mr. Mooney?

A. The five steps is to try to bring out all the facts in the case.

Q. And are some cases disposed of between the first and the fifth?

A. That's right, some cases are disposed of in the first step.

Q. Now, when is the first time that the executive board acts on the grievance?

A. The first time the executive board acts on the grievance is the fourth step.

Q. Whether it goes from the third step to the fourth step?

A. That's right.

Q. When is the first time that you as an officer of the [fol. 179] local became aware that Benny Owens had filed a grievance?

A. Well, I wouldn't be too specific on the dates because I was handling the case along with Mr. Jamerson, whatever date he stated there, I didn't pay too much attention to the date because they were calling me whenever they were ready to handle the case.

Q. Would that be at the second step that you first entered the picture?

A. That would be at the second step.

Q. You have heard the reading of Defendants' Exhibit No. 17 which is the minutes of the second step meeting.

A. I have.

Q. And what happened at that second step meeting?

A. In the second step meeting that was held the company presented a document to the union and stated that their position would remain the same.

Q. What was that position?

A. That he was not able to return to work for the lack of sufficient medical evidence. We in turn asked the company if they couldn't find a lighter job for Mr. Owens and give him a job as janitor, or something of that nature. The company had a sheet, which we do not have, and on this sheet that they had received from some doctor, I

don't know what doctor, they said he wasn't able to work in extreme climates, neither too hot or too cold, he couldn't climb stairs, and it stated a list of things on there that [fol. 180] Mr. Owens wasn't able to do.

Q. All right. What was the union's position as to whether or not Mr. Owens should have a job?

A. We told him that we would step the case up to the third step.

Q. And was that in fact done?

A. It was.

Q. And were you present at the third step meeting?

A. I was.

Q. And what happened at the third step?

A. We went over the same documents and the company told us if we had no new evidence to produce that their position would still be the same.

Q. And did the union have any new medical evidence at that time?

A. We didn't at that time.

Q. You are familiar with the exhibits that have been introduced here, the statements of the various doctors stating that Benny Owens was physically able to perform regular work, able to resume work, and so forth?

A. Only one here I am familiar with, this one from Dr. Alexander.

Q. Dr. Alexander. All right. Now, what position did the company take on these medical reports?

A. The company taken the position that on these medical reports that these wasn't a complete medical report, that they wanted a statement, they have some forms that [fol. 181] has to be filled out, and they wanted those forms filled out, what was wrong with Mr. Owens, and what medication he had, and when he would be released for work.

Q. All right. Now, you were also present at the fourth step, were you not, Mr. Mooney?

A. Yes, I was.

Q. And what happened at that fourth step meeting?

A. In the fourth step meeting Mr. Owens was present, and Mr. Burns from Chicago, Mr. Kobett and Mr. Vaca and Mr. Jamerson and myself and there were some others present. We went over Mr. Owens's case again and we still didn't have the sufficient medical evidence that our book states that you have to have sufficient medical evidence and the company hadn't taken any of this to be acceptable medical evidence so we went into the discussion of rehabilitation. The company stated to the union and Mr. Owens that they would be glad to take Mr. Owens and have him rehabilitated and help him get his social security and try to find a lighter job that he could do that would give him a longer life span because all we had to go on was what each one of these doctors put in on the statement. So in turn after we talked this over and about this rehabilitation, the heart association, I was under the impression that Mr. Owens agreed that he would be rehabilitated. And not until some weeks later I found out from the industrial relations man down at Swift's that he had offered to take Mr. Owens up and help him but Mr. Owens refused to go.

[fol. 182] Q. Who was the industrial relations man?

A. Mr. Larry—

Mr. Browne: Wait just a minute, now, that last is a voluntary statement, not responsive, based on hearsay; move it be stricken and the jury instructed to disregard what Mr. Owens said whoever it was—Mr. who? Whoever he said.

The Court: Sustained as to what was said, hearsay.

By Mr. Panethiere:

Q. After the fourth step meeting, were you present at any executive board—you were a member of the executive board, were you not?

A. Yes, I was.

Q. Were you present at any meeting at which Mr. Owens was present after the fourth step?

A. Yes, after the fourth step when it was learned that Mr. Owens didn't want to be rehabilitated then it came back to the board, well, what would we do next, so then they said, "We will take—" we agreed that we would send Mr. Owens to any doctor of his choosing to see if we could get some better medical evidence so that we could go to arbitration with his case.

Q. And what was the outcome of that decision, Mr. Mooney?

A. Well, the outcome was that he and Mr. Jamerson went to Dr. Day and in turn brought back this report from Dr. Day, stating that he would be willing to help Mr. Owens—

[fol. 183] Mr. Browne: Your Honor, what the report stated—

The Court: Sustained.

By Mr. Panethiere:

Q. Who selected Dr. Day to examine Mr. Owens?

A. Mr. Owens, I imagine.

Q. Did the union have anything to do with picking the doctor?

A. No.

Q. Did the union pay the bill for the report?

A. Yes, they did.

Q. Was there a subsequent executive board meeting at which a report from Dr. Day was received and read to the board?

A. Yes, it was.

Q. I hand you what has been marked as Defendants' Exhibit 18 and ask you if that was the letter that was opened at an executive board meeting?

A. Yes, this is the same.

Q. Now, after that letter was read to the executive board and examined, was there some discussion as to Ben Owens's case?

A. There was.

Q. Were any motions made of the fifth step?

A. Yes, there was. Yes, there were some motions made.

Q. What was that?

A. The motion was made that—

Q. Who made the motion?

A. Well, that's been a pretty long time, I don't remember who made the motion.

Mr. Browne: Excuse me just a minute. Question, please, [fol. 184] as a basis for an objection.

By Mr. Browne:

Q. Is this action of the executive committee or whatever this is, board?

A. Yes.

Q. Is that all in the minutes?

A. Yes, it is in the minutes.

Q. All the action they took?

A. Yes.

Mr. Browne: We object to that as not the best evidence, hearsay.

The Court: That is technically correct. Do you have the minutes? I will overrule the objection. It may not be the best evidence, technically. Overruled.

By Mr. Panethiere:

Q. What was the motion made to the executive board?

A. We needed some more evidence, we needed, lack of evidence to go any farther with the case.

Q. Was there a motion made to go to the fifth step?

A. There was not.

Q. What was the decision of the executive board?

A. The decision of the executive board,—I have missed something.

Q. My question was, there a motion made by someone to take this from the fourth step to the fifth step, to go to arbitration, and then was there a vote taken on it?

A. There was no vote taken for arbitration.

Mr. Browne: Objection to all of this, Your Honor.
[fol. 185] The Court: The objection is overruled.

Mr. Panethiere: I don't think he understands my question.

By Mr. Panethiere:

Q. My question was not whether there was a vote taken to arbitration. Was there a motion made by someone on whether it should go to arbitration, then a vote taken on whether it should or should not?

A. The vote was held it should not because of the lack of evidence.

Q. All right. Then was decision made whether it should go or not? Did the board decide to go to the fifth step?

A. The case was left in the hold period.

By Mr. Panethiere:

Q. Did the board decide not to go to the fifth step?

Mr. Browne: That's objected to as leading and suggestive and repetition. He has already got an answer out of this gentleman.

The Court: Overruled.

By Mr. Panethiere:

Q. What was the decision about the fifth step, whether or not they were going to arbitrate it?

A. We didn't have enough sufficient medical evidence.

Q. Well, what was their decision?

A. Their decision was not to send the case.

Q. To arbitration?

A. That's right.

Q. Thank you. All right. Then you stated that they based [fol. 186] that on some reason?

A. The lack of medical evidence.

Q. Now, did you have some conversation with Mr. Owens after he was advised of the decision of the executive board?

A. No, I didn't.

Q. You haven't had any conversation with him since that time?

A. I have not.

(Defendants' Exhibit No. 19 marked for identification)

By Mr. Panethiere:

Q. Mr. Mooney, I hand you what has been marked for identification as Defendants' Exhibit 19 and will ask you to read that and if you can tell us what that is?

A. Yes.

Q. Just, what does that purport to be? Is that the minutes of the third step meeting?

A. Yes, third step case.

Q. Third step. All right. And does that correctly reflect what happened in the third step?

A. It does.

Mr. Panethiere: At this time we offer in evidence Defendants' Exhibit No. 19, Your Honor.

Mr. Browne: Well, we object to it, not signed by anybody, self-serving, just a photostat of some typing.

The Court: Overruled. It will be received.

(Defendants' Exhibit No. 19, so offered and received in evidence, is not included herein, but will be filed separately)

By Mr. Panethiere:

Q. Now, Defendants' Exhibit No. 19 reads as follows: (Exhibit 19 read by counsel) Now, Mr. Mooney, after you [fol. 187] hold these various steps, they are reduced to writing and you receive a copy, is that correct?

A. That's correct.

(Defendants' Exhibit No. 20 marked for identification)

By Mr. Panethiere:

Q. Mr. Mooney, I hand you what has been marked for identification as Defendants' Exhibit No. 20, and ask you

if that is the memorandum you received following the fourth step meeting?

A. Yes.

Mr. Panethiere: Your Honor, I offer in evidence Defendants' Exhibit No. 20.

Mr. Browne: I take it you mean only the entry at the bottom, do you? The other concerns something else.

Mr. Panethiere: Yes, that's correct. Well, I want to offer the entire exhibit into evidence.

Mr. Browne: We object to most of it. It is an entirely different case as far as I can tell.

Mr. Panethiere: Your Honor, the only pertinent part is the Owens case. We will tie in the other cases as to showing the matter was previously processed.

The Court: It will be received in evidence.

(Defendants' Exhibit No. 20, so offered and received in evidence, is not included herein, but will be filed separately)

By Mr. Panethiere:

Q. Now, Mr. Mooney, on this memorandum you received following this fourth step meeting, there are other cases listed there, are there not?

A. Yes.

[fol. 188] Q. And in your experience as a union officer, are there cases disposed of in various manners and different steps?

A. Yes.

Q. Does that document reflect how many such cases were disposed of?

A. It does.

Q. In the normal course of business?

A. Yes.

Q. For example it shows there one particular case the union agreed to withdraw, did they not?

A. It does.

Q. And that's the fourth step?

A. That's right.

The Court: Overruled.

Q. And there was another grievance there where the company agreed to reimburse one of the employees for some pay the company had failed to pay him?

A. Yes.

Mr. Browne: If the Court please, if we are going to go into all the other cases the union handles, we will be here forever. I object to that as having no bearing at all on this case.

Mr. Panethiere: I want to show Your Honor that the pattern is that various grievances are handled at various steps and disposed of on their merits.

The Court: It is collateral. I will sustain the objection to that. Sustained. The jury will disregard the last question and answer.

By Mr. Panethiere:

Q. Now, at the bottom of the page, we have a grievance numbered 10-22105.

A. Yes.

Q. Is that the Ben Owens case?

A. That's the Ben Owens case.

[fol. 189] Mr. Panethiere: I will read that to the jury.

(Defendants' Exhibit No. 20 read to the jury by counsel)

Mr. Browne: What is the date of that, please, at the bottom?

Mr. Panethiere: That is dated November 16, 1960.

By Mr. Panethiere:

Q. Now, do you know, did you personally have anything to do with trying to rehabilitate Mr. Owens?

A. No more than the fourth step meeting.

Mr. Panethiere: You may inquire.

By Mr. Panethiere:

Q. Mr. Madney, I hand you what is the identification as Defendants' Exhibit No. 20, and ask you

Cross examination.

By Mr. Browne:

Q. Just a few questions, please, Mr. Mooney. You were vice president of the National union as well as of the Local union, right?

A. Yes.

Q. And actually did you know as such officer of both the national union and the local union that it was the duty of the officials of the union to represent the men in any grievance they had against the employer?

A. Yes.

Q. And that it was their duty faithfully to do that?

A. Yes.

Q. You knew that, didn't you?

A. Yes.

Q. In other words, that they should not work for the company or against the man, they should work for the man, the reverse, is that right, and against the company; they [fol. 190] should work for the member?

A. I don't think I understand that.

Q. Well, did you consider the officers, officials of the unions duty to their own members was to work for the man in his grievance against the company?

A. I feel that they should.

Q. Yes. All right. Now, actually did you consider as such an officer that it was necessary to pay anybody three hundred dollars or any other sum by a member to some official of the union to carry on in to the fifth step?

A. Do I feel that that should be done?

Q. Yes.

A. I don't feel that it should, no.

Q. You feel additionally that that was improper, don't you?

Mr. Panethiere: Your Honor, I am going to object to that; based on a proposition that hasn't been established, Your Honor.

Mr. Browne: It has been established in the evidence.

The Court: Overruled.

By Mr. Browne:

Q. Your answer, please?

A. State your question again.

Q. Do you think that's improper to make a request like that of one of the members for three hundred dollars?

A. If such a request was made.

Q. That's what I say, if it was made it would be improper, [fol. 191] is that right?

A. Yes.

Q. There is nothing in the rules of the union that provides for anything like that at all, is there, your union?

A. No.

Q. All right. Now, actually all five, all of the steps are decided by the company official, one official or another of the company, except the fifth step?

A. Yes.

Q. Isn't that true?

A. Yes.

Q. All that the union can do in the first four steps is present its grievance, its member's grievance to the company officials?

A. Yes.

Q. Is that right?

A. Yes.

Q. And then the company official decides it, and after that the only thing the union can do is go on with the case?

A. If it has merit, yes.

Q. Yes. Well, you thought, the union officials thought that this case had merit up to the fourth step, didn't you, because you pursued it? Right?

A. We pursued the case because we were trying to help Mr. Ben Owens.

Q. Well, I say, didn't you think that the case had merit?

A. We might not have never thought it had any merit.

Q. Well, you thought it had as much merit in the third step as you did in the fourth step, didn't you? Nothing new [fol. 192] developed between those steps, did it?

A. Well, the same, during the time between all those steps we figured that we might come up with some new doctor's reports or doctor's statements.

Q. I wonder if you would be kind enough to answer my question, sir.

A. State your question again.

Q. Between the third step and the fourth step, nothing new developed, did it?

A. No.

Q. Because only about, let me see, from August 31, 1960 to November 16, 1960, only about a month and a half intervened, didn't it?

A. That's right.

Q. All right. And so actually nothing new developed between the second step and the third step either, did it?

A. No.

Q. All right. So what the union knew then—let's put it this way—the union knew just as much about this case at the second step as it did at the third step and the fourth step. We can agree on that, can't we?

A. No.

Q. Well, what do you say came up different?

A. In the third step it was more medical evidence submitted.

Q. Well, in the fourth step there was more submitted for Mr. Benny Owens, wasn't there?

A. Yes.

Q. Yes. And this that Mr. Owens submitted to you or to [fol. 193] the union officials, I should say, in the fourth step, included at least these statements or copies of them, photostatic copies, you remember seeing those, of course, don't you?

A. I seen one, as I stated.

Q. Well, didn't you see these others? Didn't Mr. Kobett show you these others?

A. I did not see the others. I seen the one I stated I seen.

Q. Dr. Alexander?

A. That's right.

Q. Saying the man was physically able to perform regular work, right?

A. In his opinion.

Q. Yes, and also the one by Dr. Alexander May 19, 1960, you saw that, didn't you?

A. I seen the one by Dr. Alexander.

Q. The one July 8, 1960?

A. That's correct.

Q. All right. Do you say that you as a union official did not see Dr. Hesser's statement as to the blood pressure?

A. I did not.

Q. You didn't see Dr. Bruce McDonald's statement that the man was released to resume his regular work as of May 15, 1960?

A. I did not.

Q. Have you ever seen that to this moment?

A. That's right.

Q. What's right? You have or have not?

A. I haven't seen it until today.

[fol. 194] Q. Now, how long—we had a couple more around here some place. Well, maybe this is all we had. Let me see, McDonald, Hesser, Alexander and Gill, yes, have you ever seen this statement from Dr. Gill about the blood pressure?

A. I stated on three occasions I had only seen one.

Q. All right. Now, regardless of what you had seen or hadn't seen, is it true that the union officials decided to hold this matter in the fourth step, just to hold it, and made that decision on November 16, 1960, is that right?

A. Yes, because he was being rehabilitated.

Q. Well, regardless of what the because was, they did decide to hold it there, didn't they?

A. That's right.

Q. And they continued to hold that thing in the fourth step until, as your counsel said in his opening statement, May the 3th of 1964, about a month or a little more ago, isn't that true?

A. That's true.

Q. Well, the same, during the time between all these steps we figured that we might come up with some new doctor reports or doctor statements.

[fol. 197] Redirect examination.

By Mr. Panethiere:

[fol. 198] Q. Now, do you know what actually was taken on May 8, 1964 on Ben Owens's grievance, May 8th of this year?

Q. Of this year?

A. Do I know what taken place? Yes, I do, yes.

Q. All right.

A. We met at the President Hotel again and we asked the company to reconsider the Ben Owens case, we would like to discuss it.

Q. And is that the time it was decided to withdraw the [fol. 199] grievance? May 8th of this year?

A. Yes.

[fol. 200] Q. What is the procedure when the company takes the position the man is physically unable to work?

A. The procedure is the same procedure that's been followed with Mr. Ben Owens. We keep sending them to doctors, maybe the final doctor will give him a clear bill of goods and we can handle his case.

Q. And were you ever able to successfully get such a doctor?

A. We were not.

Mr. Panethiere: Thank you.

Recross examination.

By Mr. Browne:

Q. Did you try to get Dr. Bruce McDonald?

A. We tried—we sent him to the doctor of his own choosing.

Q. Please answer my question. Did you try to get Dr. Bruce McDonald here who says in exhibit 3 that the man was able to return to regular work, did you try to get him?

A. I didn't try to get him.

Q. Did you try to get Dr. Alexander who says the same thing twice, did you try to get him?

A. I did not.

Q. Did you try to get Dr. John Gill who makes the state-
[fol. 201] ment about his blood pressure being 160 over a hundred?

A. I did not.

Q. Or did you try to get Dr. Hesser who makes the same statement?

A. I did not.

Q. And you held this hearing without Mr. Owens being present the other month, month before this one, didn't you? Mr. Owens wasn't there at all, was he?

A. Not in the fourth step, no.

Q. Why, he wasn't there, and he didn't have any representative there unless it was you, did he?

A. That's right.

Q. And actually you have never told him until this minute that you, as you say, withdrew his grievance from the company, have you?

A. That I couldn't answer.

[fol. 202] Q. Yes. Mr. Owens never told you to withdraw it, did he?

A. He didn't tell me to withdraw it, no.

Q. Or anybody that you know of, did he?

A. I don't know what he might have told anyone else.

[fol. 203] The Court: Go ahead, sir.

Redirect examination.

By Mr. Panethiere:

Q. On these various steps does the grievants have to be present, Mr. Mooney?

Mr. Browne: That's objected to as invading the province of the jury, whether they were acting in good faith.

Mr. Panethiere: Your Honor, we are talking about rules and regulations.

The Court: Overruled.

By Mr. Panethiere:

Q. Do the grievants always have to be present?

A. The first step the grievant can either take his grievance to the supervisor with or without the representative; from then on the aggrieved is not in it unless you want him.

[fol. 204] Q. All right. And the union represents the man, don't they?

A. That's right.

Q. And do all cases go to arbitration?

A. They do not.

Q. A lot of them are settled at different steps, aren't they?

A. That's right.

Q. And a lot of them are withdrawn at different steps?

A. That's right.

Q. You don't have to ask the man, the aggrieved whether or not he agrees to withdraw it?

A. Don't have to, no.

Q. What are your duties as a union representative?

A. Our duty is to do all we can for an employee.

Q. Did you do that for Benny Owens?

Mr. Browne: Wait just a minute, please. That's objected to as an attempt to ask this witness to rehabilitate himself. This is the jury's function.

The Court: Sustained.

Mr. Panethiere: I believe I have nothing further.

Recross examination.

By Mr. Browne:

Q. You said that you don't have to have the man there at these steps but is it your opinion as a union official that good faith by the union and common fairness would insist that you do have him present, especially when as in this case you

knew, he was objecting to the actions of the union, the [fol. 205] inaction of the union?

A. Well, I didn't know—

Q. Is that true?

A. I didn't know that he was objecting to the action.

Q. Why, you knew a suit was filed against the officials for the union, didn't you?

A. That was filed when it first started out.

Q. Sure, and you knew it was near time for trial when this happened?

A. I didn't know how near it was to trial.

Q. You thought it was good faith to the man you were supposed to represent, didn't you, to go ahead and withdraw his claim without even notifying him about it or telling him about it afterward, is that right, sir?

A. I don't know. I didn't withdraw his claim.

Mr. Browne: That's all.

Mr. Panethiere: That's all.

(Witness excused)

MANUEL VACA was duly sworn.

Direct examination.

By Mr. Panethiere:

Q. State your name, please.

A. Manuel Vaca.

Q. Where do you live, Mr. Vaca?

A. 7303 Holmes.

Q. Kansas City, Missouri?

A. Kansas City, Missouri.

[fol. 206] Q. Where are you employed?

A. Swift and Company.

Q. How long have you worked there?

A. Going on twenty-six years.

Q. Were you, during the time of the Benny Owens grievance, an officer of the union?

A. Yes.

Q. What was your position?

A. President of the union.

Q. President of Local—

A. Local 12.

Q. You were familiar with that grievance, were you not?

A. Yes.

Q. And at what step did you enter the grievance procedure?

A. Third step.

Q. And is that the normal procedure for the president to enter it at that step?

A. Yes.

Q. You were aware of the company's contentions in the Owens case?

A. Yes.

Q. What was the company's position as to Ben Owens?

A. Well, the union did not have an acceptable medical report to the company's satisfaction.

Q. Now, have you seen, you weren't present here yesterday, have you seen Plaintiff's exhibits 1 and 3?

A. Yes.

Q. And are those the medicals that you state the company didn't consider sufficient?

A. Acceptable; yes.

Q. Acceptable. And did the company have some medical [fol. 207] reports?

A. Yes.

Q. And were they one page reports, as we have here, or how did they compare with these reports?

A. Well, of course, there were some of these there but also they have a form that they have for a doctor to fill out and I think—I don't see it here but they had a form that I believe Mr. Owens states that was from Dr. Morris from the University of Kansas Hospital. In that form they have to—

Mr. Browne: Just a minute. What is in that form we object to as not the best evidence here.

By Mr. Panethiere:

Q. Did you ever see the form?

A. Yes.

Q. Tell us briefly what the company's medical position was on Ben Owens.

A. That he was physically unable to perform his work.

Q. And they had medical evidence that satisfied you to that effect, is that correct?

A. Yes.

Q. All right. At the fourth step meeting, or prior to the fourth step meeting you, as union president, was it necessary, or did you in practice meet with the company to try to get all the facts in the case?

A. Yes.

Q. And were those facts reduced to writing?

A. Yes.

(Defendants' Exhibit No. 21 marked for identification)

[fol. 208] By Mr. Panethiere:

Q. I hand you what has been marked for identification as Defendants' Exhibit 21, and ask you if you can identify that?

A. Yes.

Q. Is that a memorandum that was prepared for the fourth step meeting?

A. Yes.

Mr. Panethiere: I offer in evidence, Your Honor, Defendants' Exhibit No. 21.

(Whereupon, the following proceedings were entered of record in the presence but out of the hearing of the jury:)

Mr. Browne: Paragraphs 6 and 7 on the first page of this exhibit are objected to as hearsay, not the best evidence, no showing as to the verity of the conclusions or the facts upon which they are based.

Mr. Panethiere: It is a memorandum prepared, Your Honor, in the usual course of business. He is the president of the local.

(Colloquy outside the record)

By Mr. Panethiere:

Q. Did you ever see the form?
A. Yes.

The Court: Well, it will be received in evidence. I think—

Mr. Panethiere: Part of a business record, Your Honor.

The Court: Objection sustained as to paragraph 7.

Mr. Browne: I still object, a business record wouldn't be admissible—

(Colloquy outside the record)

[fol 209] The Court: I am sustaining objection as to paragraph 6.

Mr. Panethiere: Yes.

(Defendants' Exhibit No. 21, so offered and received in evidence, is not included herein but will be filed separately)

(Whereupon, the following proceedings were entered of record in the presence and hearing of the jury:)

Mr. Panethiere: I will read to the jury what has been admitted in evidence as Defendants' Exhibit No. 21, and this is a memorandum prepared for the fourth step, and is headed "Fourth Step Case 10-22-105 K C 9980".

(Defendants' Exhibit No. 21 read to the jury by counsel)

By Mr. Panethiere:

Q. Now, it was on the basis of this memorandum that your discussions were held in the fourth step, is that correct?

A. Yes.

Q. What conclusions were reached as a result of the fourth step meeting, Mr. Vaca?

A. You mean with the national officers?

Q. Yes.

A. Well, you know the first step is usually held in a hotel over at town and, of course, you meet with the national officers, and also with the national company at the fourth step meeting. In this meeting, of course, the company brought out all their medical reports and, of

course, we brought out our facts; in the end they concluded that Ben was in no position to do regular work; [fol. 210] also the light work was mentioned and, of course, they still held their position that there was no light work in a packing house and that he couldn't perform his regular work. So then Mr. Burns, company official, talked directly in person to Mr. Owens for fifteen minutes, telling him the full fundamentals of different individuals that had went through the heart condition that he had and that they had been rehabilitated through the heart association and found jobs and also lived a happy normal life. Of course, he talked to Ben and, of course, Ben at that time was listening to them, and also they stated that they would try and get his social security, which they would get his social security for him and get him on a normal course. Of course, Ben was confused to a certain degree and, of course, we listened and he still talked and talked and talked. So then at that degree, we decided between our union officials to leave the case open, and we left it entirely up to Ben Owens, whatever he wanted to do. Ben Owens said he wanted some time to think about it, so we convened as of there.

In the meantime before we left Mr. Burns said he would talk to local official Mr. Helm who is industrial relations manager and would set up the date and appointment for Mr. Owens to go, if he so chooses, and so that was the last that taken place at this particular meeting at the fourth [fol. 211] step.

Q. All right. Now, did you have any conversations with Ben after it was decided to hold this matter in the fourth step?

A. Yes. After a period of I imagine about a week or two Mr. Helm stopped me and said he had made an appointment with Mr. Owens to the heart rehabilitation and he had failed to show up, so I said I would talk to Mr. Owens and see what he wanted to do, and Mr. Owens said that he wasn't about to go to any heart association or any social security, he was in good physical condition and he was

able to perform a job. So I brought Mr. Owens's decision to the board and the board ruled that since that we have tried every way we possibly could to get Mr. Ben Owens back to work that we will let Mr. Ben Owens pick a doctor, his own doctor, and we will pay the bill. So in turn Ben Owens said that—of course, he was there—he said that well, we will send Jamerson with him because after all Jamerson would know the questions that he would get from the doctor and would be best to talk up and be able to get Ben Owens back to work, so unbeknownst to me Ben Owens picked his doctor and they went to his doctor.

Q. Did you have a meeting after that when you—

A. Yes. So then in a few days we got a letter from his doctor and we had a regular board meeting and this letter [fol. 212] was read to the board members and the board members voted on what to do with Ben Owens' case after receiving and reading this letter. Well, Mr. Jamerson got up, so since he was Mr. Ben Owens' representative all the way through, made a motion to send it to arbitrator, in order to fulfill his job all the way through, and I am pretty sure we had a gentleman there, a board member by the name of Mr. Randolph seconded the motion, there was discussion on the motion, quite a lengthy discussion; in the end the board ruled—

Mr. Browne: Just a minute. I want to ask a question as a basis for objection.

By Mr. Browne:

Q. You keep minutes on all of this, don't you?

A. Yes.

Q. Written minutes?

A. Yes.

Mr. Browne: We object to any verbal testimony as not the best evidence.

The Court: Overruled, but I will sustain objection to conversations.

Mr. Panethiere: Yes, sir.

By Mr. Panethiere:

Q. Proceed.

A. And the board ruled not to send Mr. Jamerson's case at this particular time but to hold it and see what would develop, and in the meantime, after we held his case, Mr. Owens came into the hall numerous of times, not once, not [fol 215] twice, but three or four times, and I asked Ben Owens, I said, "Ben, how are you doing?" He said, "I am doing fine." "Are you really?" He said, "Yes." I said, "Well, I am happy." Then one day Ben Owens pulled money from out of every pocket that he had and filled that desk with money, he says, "See, I am doing all right, I don't need no help," he says, "I am going to get my job back, I am going to get all my back pay and everything," he said, "You people have treated me fine and I appreciate it." That was the last I seen of Ben Owens.

Q. You weren't present yesterday, Mr. Vaca. Do you recall any conversation with Mr. Owens relating to money other than the incident you have mentioned when he pulled money out of his pocket?

A. No, sir.

Q. Did you ever make a request or demand upon him for any sum of money?

A. No, sir.

Q. Would you deny that you ever requested three hundred dollars from him to handle his case?

A. I never heard of no such a thing until it come up in that meeting, that was a complete mystery to me.

Q. Now, as local union officer did you have the power to decide whether or not the case was going to the fourth step or the fifth step?

A. No, sir.

Mr. Panethiere: You may inquire.

[fol. 214] Cross examination.

By Mr. Browne:

Q. Mr. Vaca, just a few questions, please. May we agree that the first time that any disinterested party acts as arbitrator is at the fifth step?

A. Yes.

Q. And may we also agree that all the other steps, the first four, at all of those steps the decision as to the grievance is made by the company officials? Is that true?

A. Yes.

Q. So that the only steps in which you officials of the union represented Mr. Owens were at steps where the company had the say-so on the decision, is that true?

A. Well,—

Q. The first four?

A. Yes and no.

Q. Well, what is the "no" to that?

A. Well, it means this, that the union negotiates among themselves and warrants whether or not a case should be sent on and if we decide to withdraw the case in the first, second, third or fourth step, the executive board so chooses.

Q. But to push this step for your own members, the decision, if you are pushing the step the decision up to the fifth is in the hands of the company, isn't it?

A. Well, the fifth step is the arbitration step.

Q. I am not talking about the fifth. I say up to the fifth.
[fol. 215] A. Yes.

Q. The decision is in the hands entirely of the company, is that right?

A. Well, of course, it goes both ways.

Q. Well, I say if the union decides to push it, the final decision is in the hands of the company. Can we agree on that?

A. Yes.

Q. All right. Will you agree that it would be improper for an official of your union to ask for three hundred

dollars to take a case, or any sum, from a member, to take the case to the fifth step?

A. That's outrageous.

Q. You agree that it is, don't you?

A. Yes.

Q. And it is true, may I ask you, sir, if Mr. Jamerson was present at a board meeting concerning the fifth step, a decision as to whether you would go to the fifth step?

A. You mean he was present at the fourth step meeting?

Q. At a meeting where the board was deciding whether to go to the fifth step?

A. Yes, that's the fourth step meeting.

Q. Do you say that these medical reports were submitted at the—I am talking about Plaintiff's exhibits 1 and 3, the medical reports in which Doctors McDonald, Hesser, Alexander and Gill expressed an opinion about the plaintiff being able to go back to work, do you say that those were [fol. 216] submitted to the company by you officials at any time?

A. Yes, but they, as you recall it has been stated before that you can present anything to the company and if it is not acceptable, then you haven't got anything.

Q. If you would stick to the question I asked you, please, sir, then we will move along?

A. Yes, I did, I answered your question.

Q. The answer is yes, then?

A. Yes.

Q. And you knew therefore at all times that we are talking about that these four doctors did indicate that Mr. Owens was able to go back to work and do regular work?

A. It states there that they said that.

Q. Yes.

A. Yes.

Q. And so then when you say that you didn't want to go any farther with it as an official of the union, you were undertaking to evaluate these four doctors as to their opinion as being worthless?

A. No.

Q. Is that it?

A. No, no, that's not it.

Q. Then what—

A. Would you read the clause in our contract that states that a person, a member has to have acceptable medical evidence, and this is not acceptable medical evidence.

Q. Don't you know that Dr. Bruce McDonald is a fine doctor, although a colored doctor, if you want to put it that way?

[fol. 217] A. Well, I don't think you should put it that way.

Q. I don't either.

A. Why did you then?

Q. Let me ask you, do you know that Dr. Bruce McDonald is a fine doctor?

A. Yes.

Q. Out here on 26th and Prospect?

A. Yes.

Q. Do you know that Dr. Alexander is an old time doctor, been practicing for many years?

A. No question about that.

Q. An M.D., no chiropractor, and so forth. Do you know that Dr. Gill is an established doctor, has been for years; you know that, don't you?

A. Let me say—

Q. Please answer.

A. Yes. Yes.

Q. All right. And the other doctor, Dr. Hesser, you know he is a reputable doctor. Right?

A. Right.

Q. All right. Now, Mr. Vaca, I will ask you if it is true that notwithstanding that you had these medical statements in your file, or copies of them, that about a month and two weeks ago your board met again; were you in that meeting?

A. No. I am out of office now.

Q. All right. Well, let me ask you this then. Do you feel as a former union president that in the fourth step, the

union should in good faith hold a meeting in the fourth step, not advise its member who is interested, that a meeting is going to be held, or where, and then withdraw the [fol. 218] grievance from the company?

Mr. Panethiere: Your Honor, I object to this as irrelevant and immaterial, it is a matter that has happened since this lawsuit was filed, has no bearing on the grievance procedure, Your Honor.

Mr. Browne: Well, he has pleaded it.

The Court: Overruled.

By Mr. Browne:

Q. Do you think that's treating the members in good faith?

A. Well, of course, the way that you are putting it, you are speaking of members, let's speak of Ben Owens. I think that the union acted in good faith, yes.

Q. You think that's all right then, do you?

A. No, I think that pertaining to the whole facts in this case I think the union acted in good faith.

Q. To arbitrate—I mean—

A. Yes.

Q. Now, let me finish. Just to withdraw his grievance without notifying him or even telling him after they had done it?

A. Ben Owens did not notify us when he was suing the company, he did not notify us when he was suing us.

Q. You had a summons served on you—

A. But Ben Owens was acting in good faith toward us, he had been to us many times, everything was going along fine, he told me.

Q. So then it is your feeling that the union was entitled [fol. 219] to take this action in May in retaliation?

A. Under this particular case, yes.

Q. In retaliation?

A. Yes, in this particular—not in retaliation, in good faith and good judgment; not in retaliation, no.

Q. Is a man in your employment there at Swift and Company, is he entitled to a pension under your contract agreement after twenty years service?

A. Under the provisions of the contract agreement, yes.

Mr. Browne: That's all.

Redirect examination.

By Mr. Panethiere:

Q. Now, you state that in your grievance procedure that the company, in response to his questions, controls the grievance procedure, is that right?

A. No, sir.

Q. Now, are some cases settled in the various steps?

A. Yes, sir.

Q. And on what basis—are they always settled on the company's terms?

A. No, sir.

[fol. 220] Q. Isn't it a fact that sometimes before you get to the, even the fifth step, that you work out a satisfactory solution to a problem with the company?

A. Yes, sir.

Mr. Browne: If the Court please, we object to going into all kinds of other cases in this trial.

Mr. Panethiere: You opened it up.

The Court: Overruled.

By Mr. Panethiere:

Q. Is it a fact that you received a copy of what has been marked as Defendants' Exhibit No. 20 after the fourth step meeting, did you not?

A. Yes. Yes.

Q. All right. Doesn't that show under case No. 10-22-87

there where the company agreed to the union's terms and reimbursed a man for some pay that they neglected to pay him?

A. Yes.

Mr. Browne: That's objected to. The exhibit would be the best evidence.

The Court: Overruled. He has answered.

By Mr. Panethiere:

Q. Now, Mr. Vaca, in your term of office as president you became aware and cognizant with the sick leave provisions, did you not?

A. Yes.

Q. And to qualify for sick leave, what has to be the criteria of the employee?

[fol. 221] Mr. Browne: That's objected to since the contract would show that. It is in evidence. We say it is taking up time unnecessarily.

The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. When a person is off sick and as a general rule if he is not habitual, there is nothing ever said or questioned but if a person has been off quite a few number of times sick then the company requires him to bring an acceptable medical report.

Q. And during the period that he is on the sick leave status does he receive any pay?

A. Yes.

Q. Do you know what percentage Mr. Owens was drawing while he was off on sick leave?

A. I imagine since he was off for quite—

Mr. Browne: We object to that, what he imagines.

By Mr. Panethiere:

Q. Do you know?

A. Yes, I know he had to draw the maximum which is [fol. 222] sixty-five percent.

Q. Now, in order to draw that maximum what proof do you have to give the company as to why you are entitled to sick leave pay?

A. Well, if you are off for a long period of time then you have to bring periodically accepted medical reports.

Q. Stating that you are unable to return to work?

A. Yes.

Mr. Panethiere: Nothing further.

Recross examination.

By Mr. Browne:

Q. Sixty-five percent is for the fifth and subsequent weeks of disability, is that right?

A. Yes, that's the last, that's the highest.

Mr. Browne: That's all.

(Witness excused.)

ERNEST F. KOBETT was duly sworn.

Direct examination.

By Mr. Panethiere:

Q. Will you state your name, please?

A. Ernest F. Kobett.

Q. Your address?

A. 1020 Court Street, St. Joseph, Missouri.

Q. Are you an officer of the National Brotherhood of Packing House Workers?

A. I am.

Q. What office do you hold?

A. Office of first vice-president.

[fol. 223] Q. And that you consider at the national level as opposed to what we call local level?

A. Yes, sir.

Q. Do you service the Kansas City local, which is Local 12?

A. I do.

Q. You are a party defendant or a named defendant in this lawsuit brought by the plaintiff, are you not?

A. I am.

Q. What are your duties as vice president of the national brotherhood?

A. The duties of first vice president of National Brotherhood is to handle the fourth step grievance cases, arbitration cases, and new rates.

Q. Do you also assist in contract negotiations?

A. Yes, sir.

Q. Now, have you had occasion to become familiar with the grievance of Benjamin Owens?

A. I did.

Q. When did you first become aware that there was a grievance on behalf of Benjamin Owens?

A. I don't know the exact date, I received word from Local 12 that they wished this case to be heard in the fourth step.

Q. Ordinarily in a grievance procedure is that the first [fol. 224] notification that you receive when it goes from the third step to the fourth step?

A. Yes.

Q. Then you enter the picture at the fourth step level?

A. At the fourth step level.

Q. You make the arrangements for the fourth step meeting?

A. I contact the company, requesting a meeting, tell them where we want to meet.

Q. Prior to that time, what arrangements do you make to familiarize yourself with the facts pertaining to the grievance?

A. Prior to that time I have contact with the local, they send me a copy of the fact sheets that have been submitted here in evidence, and I go over the facts of the case sent to me by the local and confer and talk to our attorney about it.

Q. Now, ordinarily at these fourth step meetings do you usually have just one grievance, handle one grievance at a time, or are there many grievances processed at one time?

A. Well, it all depends on how many the local has. If we are at a given local, we handle all the grievances at the same meeting that they happen to have in the fourth step.

Q. Now, in your participation in the fourth step meeting will you tell us generally the discussions had and the results reached as a result of that meeting?

A. Are you referring to this meeting—

[fol. 225] **Q.** Benjamin Owens.

A. At the meeting of Benjamin Owens, at that time the national union, we were in a transition, the vice president whose place I took, Lawrence—was in charge of the meeting and the reason for that was, at the convention where I was elected the convention made a motion that he finish the unfinished business. In other words, he handled any cases that were on the docket up to that time. But I take the responsibility for the meeting that we had at the President Hotel. At this meeting we meet with the company, I have the representatives of the local as my assistants, we work together on the thing in getting all the facts, we present our facts to the company, and we argue the case, and in this case we wanted Ben Owens put back to work and we were unsuccessful, as you know.

Q. You say you were unsuccessful. Now, prior to that did you review all the records and the medical available to you in this case?

A. During the meeting, yes.

Q. Yes. And were you also furnished copies of the company's medical reports?

A. I did not receive any copies of the company's medical reports.

Q. But you saw them there at the meeting?

A. Yes.

Q. Now, you have seen Plaintiff's exhibits 1 and 3? [fol. 226] A. Yes, I have seen these.

Q. And those were presented at that meeting, were they not, on behalf of Mr. Owens?

A. Yes.

Q. And it was based on those that you were trying to present Mr. Owens's case?

A. These and some of the arguments that the local had in regard to Mr. Owens.

Q. And what was the company's position with reference to these medical reports?

A. The company took the position that these medical reports were not conclusive, that they only showed the blood pressure, and that they required, they would require, in this case a full medical report.

Q. Did they have any question as to the qualifications of the doctors shown there?

A. They did not question the integrity of these doctors.

Q. And prior to the time you entered the fourth step did you review the actions taken by the local office in handling the grievance of Benny Owens?

A. Yes, I reviewed that in the fact sheets.

Q. Did you find anything in reviewing those that would indicate that the matter had been mishandled?

Mr. Browne: Just a minute, now. That is objected to as letting this witness determine what the jury is to determine, calling for improper conclusion.

Mr. Panethiere: Your Honor,—
[fol. 227] The Court: You asked him if he found anything that was mishandled?

Mr. Panethiere: In his capacity as national officer, Your Honor, he has a duty to review the actions of the local

officers in handling grievances. My question was whether he found whether or not this grievance had been handled properly.

Mr. Browne: Our objection is that that's what the jury is here to decide.

The Court: Overruled.

By Mr. Panethiere:

Q. Now, when you reviewed this record, in your judgment how was the grievance handled up to the fourth step?

A. The grievance, to my knowledge the grievance was handled correctly, and I get that idea from the fact that it did come to the fourth step, so they went through the steps.

Q. Now, did you talk with Mr. Owens here at the fourth step meeting?

A. I had some conversation with Mr. Owens, yes.

Q. Do you remember the discussion about, after no agreement could be reached, about trying to rehabilitate this man?

A. Yes.

Q. And what was your impression as to Mr. Owens's acceptance or rejection of those suggestions?

A. Mr. Owens seemed a little reluctant but it was my [fol. 228] feeling that when we—we left the fourth step that he was in agreement with the way the union handled the grievance there at that meeting.

Q. And this matter was—you were furnished a copy of what has been marked as Defendants' Exhibit 20, were you not?

A. Yes.

Q. And that is where it states that the union agreed to hold that in the fourth step?

A. Right.

Q. And that was in fact held in the fourth step until May 8th of this year, was it not?

A. That's correct.

Q. And can you tell us what happened on May 8th of this year?

A. On May 8th of this year we had—I had meetings scheduled in Kansas City to hear fourth step cases. At that time I requested that the company be prepared to review case 105, the Ben Owens case, at this meeting. I felt that it had been held in the fourth step long enough that we should make some determination. And on the review I got nothing new from the local over the report from Dr. Day which plainly stated that he was not able to return to work and that the union had acted in good faith. I therefore withdrew the grievance.

Q. And you were aware, were you not that there were lawsuits filed both against the employer and you were named in one suit?

[fol. 229] A. Yes. The information on the company suit, it was hearsay. I received a summons on my own.

Q. Now, in handling grievances, about what percentage of cases go to arbitration?

A. A very small percent.

Q. In your work as vice president with the national do you have any notes to indicate how many grievances are filed during a given period?

A. Yes, I keep a record.

Q. Do you happen to have the record with you?

A. I happen to have the record drug off there for a period of time on grievances that were handled and how they were settled—and settlements in different steps.

Q. What period of time do your notes reflect?

A. From 9-1-'61 to 8-16-'63.

Q. How many grievances were filed?

Mr. Browne: If the Court please, how many grievances were filed altogether or what was done with them, seems to me is completely foreign to the issues of this case. We object to it for that reason.

The Court: Overruled.

By Mr. Panethiere:

Q. How many grievances were filed in that period?

A. In that period of time for all plants, 967.

Q. And were some of those settled in the first step?

[fol. 230] A. In the first step, 207.

Q. What about the third step?

A. In the third step, 214.

Q. And were any settled in the fourth step?

A. Thirty-five.

Q. Did any go to arbitration?

A. One went to arbitration and we won it.

Q. Now, when you say a case is settled in a certain step, what do you mean by settled?

A. That they were settled to the satisfaction of the union.

Q. And in other words, does the company control whether or not the case goes to the next step?

A. No. We determine that.

[fol. 231] By Mr. Panethiere:

Q. Have you had any discussion with Mr. Owens since the fourth step?

A. No.

Q. And you did receive some correspondence from Mr. Owens's attorney prior to the fourth step, did you not?

A. I did.

Q. And you knew, and the union knew prior to the fourth step of the grievance procedure that he had engaged an attorney?

A. We—I did.

Q. And with those facts in mind, it was still decided not to go to arbitration?

A. Yes.

Q. And do you know on what basis it was decided not to go to arbitration?

A. We did not feel that we had sufficient medical evidence to win the case before the arbitrator.

Q. When a decision is made on whether or not to proceed to arbitration, does the grievant, or the man who filed the grievance, does he have to agree to it?

A. No, sir.

[fol. 232] Q. Is that standard practice?

A. That is standard.

Q. Why has that practice developed?

Mr. Browne: Now that is objected to as argumentative, not tending to prove any issue in this case.

The Court: Overruled.

By Mr. Panethiere:

Q. Why has that practice developed?

A. Well, the employee who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case or we don't have a case. Then the union makes the decision, and the reason for that is that a union wouldn't last long if they had to arbitrate every case that was filed by an employee.

Q. In your capacity handling grievances, are there any grievances that are not processed, does an employee sometimes file a grievance that is not processed?

A. Any grievance filed is processed to a conclusion. It is either—either receive a favorable or an unfavorable decision in one of the steps.

Q. Does the union ever withdraw any grievances?

A. A lot of them, yes.

Q. At any particular stage, or—

A. When we find out either that it is not a violation of the master agreement or we cannot—we can't win the case.

[fol. 233] Q. Are there any grievances filed which in the opinion of the people handling them do not have merit to them?

A. We have a lot of cases filed that do not have merit.

Q. Now, it was felt, was it not, that the Ben Owens case did have merit to be processed to the fourth step?

A. Yes.

Q. Have you had any discussion with the president and the general counsel of the national brotherhood with reference to this case after suit was filed?

A. I have.

Q. And what was their position on proceeding with this case after they received notification of the suit?

Mr. Browne: That is objected to as self-serving, calling for hearsay, not binding on the plaintiff in any way.

The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. Our national attorney and national president, after reviewing the facts of the case, advised me that the case should be withdrawn.

Mr. Panethiere: You may inquire.

Cross examination.

By Mr. Browne:

Q. Did the national president and the national attorney, whoever you say it was that gave you such a decision, see these five statements from—

A. Yes, sir.

[fol. 234] Q. —doctors who were not questioned by the company?

A. Yes, sir.

Q. And you saw those five statements from these doctors who were not questioned by the company, did you?

A. You gave them to me, sir.

Q. I gave you copies, did I not, photostatic copies?

A. That is right.

Q. That was before the fourth hearing?

A. Yes.

Q. So you knew all about what these doctors that the company did not dispute, didn't you,—

A. Yes, sir.

Q. —you knew what they would say, and you knew also from talking with the local people that these were reputable physicians, didn't you?

A. Yes.

Q. Yes, and yet you decided in the union management that notwithstanding those five statements that the man was qualified to go back to regular work that he did not have a case you could win before the first neutral arbitrator, is that true?

A. I did not think we could win the case.

Q. And you never at any time submitted his case then or recommended his submission to any neutral arbitrator, did you?

A. I did not recommend this case to arbitration at any time.

Q. The only presentation of Benny Owens' case that the union officials ever made was to the company officials for [fol. 235] their decision, right?

A. We have been doing that for years; yes, sir.

Q. I say that in this case was true, wasn't it?

A. That's right.

Q. And on May 8, 1964, about five weeks ago, Benny Owens was not notified of the time or place of this hearing, was he?

A. To my knowledge he was not.

Q. And Benny Owens was never notified of the result of this, what you call a hearing in the fourth step, was he?

A. To my knowledge he was not. I had no contact with Mr. Owens.

Q. Actually, of course, at all times you are acting for the national union and local union?

A. That's right.

Q. As its official, aren't you?

A. That's right.

Q. And do you recall receiving letters from me, sir, on—well, these several dates you have heard in the case, haven't you?

A. Yes.

Q. That I have presented to the jury, but I am particularly interested in these after the hearing of the fourth step. You remember receiving the originals of these, don't you?

A. Yes.

Q. And one on November 25, 1960 particularly where I wrote you, "Please advise the results of the fourth step of [fol. 236] the grievance procedure held on November 16, 1960"?

A. Yes.

Q. Then this is your letter, Exhibit 6, isn't it?

A. Yes.

Q. Where you said it is still open?

A. That's right.

Q. Pending further physical examination to Mr. Owens?

A. Correct.

Q. But at that time you had in your file these five doctors that said he was able to go back to regular work, didn't you?

A. Yes, and there were some doctors who said he was not, too.

Q. I know. But that made an issue, didn't it, that you could very well submit to an arbitrator for a decision, is that true?

A. But it wasn't necessary to do so.

Q. You decided—

A. I decided that.

Q. —it was not necessary. But with five doctors not questioned by the company on Benny's side, and two doctors on the other, you still say that that was not a case that should be submitted to the only neutral arbitrator in the matter?

A. And I think it was a good decision. I can still see Mr. Owens.

Q. Do you recall—did you know that Mr. Owens—did you hear him testify about the kind of work he has done in [fol. 237] the four years since these two doctors said if he worked he would die?

A. Yes. I am sure glad he didn't.

Q. Yes. And you say that now that in your opinion from looking at him that you don't think he is able to do a hard day's work such as he has been doing for four years?

A. I am not qualified to look at Mr. Owens and say whether or not he can work.

Q. All right. Now, you recall my writing you again, do you, December 14, 1960, Exhibit 5—

A. Yes.

Q. —asking you the results of the fourth step, or if you planned to go further, you recall that letter, don't you?

A. Oh, yes.

Q. And you recall my saying that Mr. Owens does not understand why the company doesn't put him back to work in view of the strong medical statements?

A. Yes.

Q. And then you didn't answer that letter, did you?

A. No, I didn't.

Q. No. And then I wrote you another letter January 5, 1961, you remember that, Exhibit 4, of course, don't you?

A. Oh, yes.

Q. Yes, in which I asked you again, "Please advise whether the union contemplates any further action on the matter of Benjamin Owens against Swift and Company. [fol. 238] Please refer to our letter of December 14, 1960."

A. Yes.

Q. And you didn't answer that either, did you?

A. No.

Q. In fact, you haven't answered anything since then, since this letter that I showed you, Exhibit 6, have you, sir?

A. No.

Mr. Browne: All right. That's all.

Redirect examination.

By Mr. Panethiere:

Q. Mr. Kobett, Mr. Browne keeps referring to these unchallenged medical reports, unquestioned. What did the company tell you about these medical reports?

A. That they were not acceptable because they were not full examinations, that they were only blood pressure.

Q. Did they tell you that they were not questioning the qualifications of these doctors?

A. Yes.

Q. They wanted something besides a blood pressure reading and a one sentence report?

A. That's right.

Q. Did they show you three and four page medical reports on this man from K. U. Medical Center?

A. Yes, sir.

Q. You also saw Dr. Day's report after it was received?

A. Yes, sir.

Q. You made a comment that you could still see Ben here. What do you mean by that?

A. He's still alive. Had we acted differently maybe he [fol. 239] wouldn't be. Nobody knows.

Q. That's beyond our province.

Mr. Browne: Now, we object to that last statement as argumentative, and move it be stricken and the jury instructed to disregard it.

The Court: The jury will disregard that.

By Mr. Panethiere:

Q. Did you have any personal animosity toward Mr. Owens?

A. No, sir.

Q. Do you know of anybody in the local that had any animosity towards this man?

A. No, sir.

Q. As a national officer, what are your responsibilities with reference to the individual members?

A. Say that Mr. Owens would have had correspondence with me saying that the local was not doing their job, in following the steps of the grievance procedure, I would have contacted the national president and we would have sent somebody in there to see why they weren't doing their job.

Q. But you never received any communication directly from Mr. Owens, have you?

A. No, I have not.

Q. You did receive a letter from his attorney prior to the fourth step, did you not?

A. I did.

Mr. Panethiere: Nothing further.

Recross examination.

By Mr. Browne:

Q. Well, do I get from that that because Mr. Benny [fol. 240] Owens went to a lawyer to try to get his rights for him that you wouldn't recognize the claim on that account? Is that what you mean?

A. I would make every effort to see to it that Mr. Owens got his rights, regardless.

Q. Yes.

A. And I did so.

Q. You didn't object to my trying to help Benny when I furnished you these copies?

A. I accepted them, sir.

Q. You called me on the phone, didn't you, and asked me?

A. I did, sir.

Q. And I gave them to you?

A. I did, sir.

Q. And I told you that I hoped that you would represent him and I wouldn't go with him. You remember that?

A. That's right.

Q. And actually now you mentioned a doctor that the company referred to, that was Dr. Morris, wasn't it, Dr. Morris from the University of Kansas Medical Center?

A. Yes.

Q. And you are familiar with this exhibit offered by the defendants, 21, in which it says in their exhibit that Dr. Morris never even saw the man, "Dr. Morris did not know Ben Owens and had never seen him, nor had he prescribed." Did you know that was in these papers of the union?

A. I had a copy of them.

[fol. 241] Q. And that that was the doctor upon whom the company was relying in fighting this claim, you knew that, didn't you? Sir?

A. I knew what was in the fact sheets.

Q. So taking the statement that the company furnished you of a doctor who admittedly had never seen Benny Owens against five statements by a medical officer whose integrity was not questioned, or qualifications, by the company, that he was regularly qualified—I mean qualified to go back to regular work, you decided that you couldn't make a case in the fifth step, is that it?

A. I decided that it would not be to our advantage to go to the fifth step with the evidence I had.

Mr. Browne: That's all I have.

Redirect examination.

By Mr. Panethiere:

Q. Mr. Kobett, I have one question here, maybe Colonel Browne didn't read this correctly, he was reading here from alleged facts presented by the union and not agreed to by the management, isn't that what he was reading from?

A. Yes.

Q. Did the union say—did the union bring up that point that this doctor had never seen Ben Owens?

A. Yes.

Q. That was the union's argument, is that right?

A. That was our argument, of course, I wasn't going to [fol. 242] say, I don't know whether it's a fact or not, but we argue the case the best we know how, might twist it around a little bit but we do it for the benefit of our members.

Mr. Panethiere: Thank you.

Recross examination.

By Mr. Browne:

Q. So you threw your own argument in the wastebasket when you were deciding that you would not go on to the fifth step, is that it?

A. After we seen Dr. Day's report we withdrew the case.

Q. I am talking about Dr. Morris, the company's doctor, who in your statement says that he never had seen the man. You adopted that, didn't you?

A. We held the case open in the fourth step.

Q. Until—

A. And had Dr. Day's report been the opposite of what it was, we would have went to the arbitrator without reservation.

Q. You held it until five weeks ago, didn't you?

A. Yes, sir.

Mr. Browne: That's all.

Redirect examination.

By Mr. Panethiere:

Q. Now, this matter of holding it, Mr. Kobett, why was the case held so long?

A. The case was held because we were grasping for straws trying to get Mr. Owens back to work. Once we dispose of it, withdraw, they could have withdrew it in the [fol. 243] second or third step under the contract, they

didn't do it, they tried to, they kept it open so that we could try to get Mr. Owens back to work. That was our objective but we wanted to get him back to work and we didn't want anything to happen to him after we got him back to work, we wanted to be sure also that he was physically able to return to his regular employment.

Q. Now, the union could have dropped it at the fourth step, couldn't it?

A. Absolutely.

Q. After the fourth step meeting, they could have dropped it and closed the case right there?

A. That's it.

Q. Instead they held it open?

A. Right.

Q. Did you have any discussion about the rehabilitation and obtaining both disability and social security for Mr. Owens?

A. It was discussed at the President Hotel at that fourth step meeting.

Mr. Panethiere: Thank you.

Recross examination.

By Mr. Browne:

Q. And do you say, sir, that there is no significance in your attempting to withdraw, or withdrawing this grievance in the fourth step after this case had been sent out last month for trial, that that's just a coincidence, that you attempted to withdraw it then?

A. I would say it was a coincidence for this reason, that [fol. 244] we did have a meeting scheduled in Kansas City, and we like to review the cases that are being held and dispose of them if possible.

Q. Did you have quite a few meetings in the four years almost intervening between when you started to hold it and when you attempted to withdraw it?

A. We have a lot of meetings.

Q. Yes. You have been down here hundreds of times in between, haven't you?

A. Oh, I wouldn't say hundreds of times, sir.

Q. Well, make it dozens, is that all right?

A. That's close.

Mr. Browne: That's all.

Redirect examination.

By Mr. Panethiere: /

Q. I have one further question, Mr. Kobett. Did the setting of this—when were you first notified this case was going to be tried starting yesterday?

A. I was notified by you by telephone Tuesday evening at six-fifteen.

Q. And did the setting of this case have anything to do whatsoever with the disposition of the Benny Owens grievance in the fourth step?

Mr. Browne: That's objected to as argumentative.

Mr. Panethiere: You opened the door.

Mr. Browne: Invading the province of the jury.
[fol. 245] The Court: Overruled.

By Mr. Panethiere:

Q. You may answer.

A. It was a coincidence, I didn't know whether this case was coming up today or a month from now until I got your telephone call.

Mr. Panethiere: Thank you, sir.

Mr. Browne: That's all.

(Witness excused.)

Mr. Panethiere: The defendants rest, Your Honor.

DEFENDANTS REST

The Court: Is there rebuttal?

Mr. Browne: Yes.

REBUTTAL EVIDENCE

BENJAMIN OWENS resumed the stand.

Direct examination.

By Mr. Browne:

Q. You are Benny Owens and you have previously testified in this case?

A. I did.

Q. Benny, I have made several notes here of the evidence as it has gone along and I want to ask you about some of these things. I will ask you about whether Dr. Day said, in your hearing, at any time, that you were not able to go to work?

A. No, not in, not in, not in my presence.

Q. All right. I will ask you whether or not Mr. Jamerson said that you were able to work, in his opinion?
[fol. 246] A. Yes.

Mr. Panethiere: Your Honor, I object to that question as hearsay.

The Court: Overruled. In his presence? Overruled.

By Mr. Browne:

Q. I will ask you concerning—oh, whether you knew Dr. Day at all before you went over to his office?

A. I never seen the man, nor heard of the man in my life.

Q. So did you know whether the company liked him or didn't—I mean whether he liked the company or didn't like the company? Did you know either way?

A. I did not know because I didn't even know the man.

Q. Are you able to, and were you at all times during your employment with the company, and with the exception of the time when you took this sick leave, or leave, or whatever you call it, temporary leave, during that time, all the time you were working, with the exception of that time off, could you go up steps and down steps all right?

A. Oh, yes.

Q. Could you go in and out of cold and hot places all right?

A. Sure.

Q. Did you?

A. I did.

Q. And have you since then?

A. Yes.

Q. Have you gone upstairs freely and downstairs?

A. I have gone upstairs and trimmed trees and cut trees and topped trees simply because that's the way I am [fol. 247] making my living now. I got no other way to make it.

Q. And heaving those big, I mean those heavy sacks up seventeen high, did you do that?

A. That's right.

Q. All right. Did you ever know until this day that the union officials had attempted to withdraw your grievance in the fourth step?

A. No, I didn't.

Q. Did anybody tell you of any meeting on May 8th of this year?

A. No.

Q. Or any—or did they notify you of the result of any such meeting?

A. No.

Q. Until you heard it on the witness stand here?

A. That's right.

Q. Now, as to this three hundred dollars, I will ask you whether or not you and Mr. Jamerson did have a conversation that involved the sum of three hundred dollars, and if so, what it was?

A. I did.

Q. Tell the jury what it was.

A. Concerning the three hundred dollars, Mr. Manuel asked me for three hundred dollars to represent me. I told him—

Q. Mr. Who did?

A. Mr. Vaca.

Q. Manuel, you are talking about?

A. Mr. Manuel.

Q. All right.

Mr. Panethiere: Do I understand you right, you told this to Mr. Jamerson?

[fol. 248] Mr. Browne: No, he didn't tell—

Mr. Panethiere: Just a minute—

By Mr. Browne:

Q. Now go ahead and tell what you did—

Mr. Panethiere: Let me have the reporter read the question back.

(Question read as follows: "Question: Now, as to this three hundred dollars, I will ask you whether or not you and Mr. Jamerson did have a conversation that involved the sum of three hundred dollars, and if so, what it was?")

By Mr. Browne:

Q. Now, I am asking you about your conversation with Mr. Jamerson. You have told about your conversation with Mr. Vaca. Now tell the jury about your conversation with Mr. Jamerson.

A. Yes. I told Mr. Jamerson that Mr. Vaca asked me for three hundred dollars to represent me in the arbitration and I told Mr. Jamerson, I says, "I won't give it to

Mr. Manuel," I says, "but I will give it to you because I trust you more than I will Mr. Vaca."

Q. What did Mr. Jamerson say?

A. Mr. Jamerson says, "No," he says, "I couldn't do that."

Q. Did he say you had to give three hundred dollars to anyone?

A. No, he said I didn't have to.

Mr. Browne: I believe that's all.

[fol. 249] Cross examination.

By Mr. Panethiere:

Q. Mr. Owens, just one point here. Mr. Vaca wasn't here yesterday, I want you to relate where this incident took place and the words that were said by Mr. Vaca to you with reference to the three hundred dollars.

A. I asked Mr. Vaca was he going to represent the case,—

[fol. 250] Q. And what did he tell you?

A. —to the arbitration. He says no, that the union was broke and he did not have the money. And he asked me, he says, "You let me have three hundred dollars and I will represent the case."

Q. And where did this take place, this conversation?

A. It taken place between the packing house and the union hall.

Q. Do you remember the approximate time?

Mr. Browne: I didn't hear the question.

Mr. Panethiere: The approximate time.

A. It was around noon.

By Mr. Panethiere:

Q. With reference to the fourth step meeting, when did this occur?

A. With reference to the fourth step meeting?

Q. Yes.

A. That was after the fourth step meeting.

Q. How long after?

A. Somewhere between the last of January and the first of February, somewhere in the neighborhood.

Q. Was that after you had been to Dr. Day?

A. No, I hadn't been to Dr. Day at that time.

Q. You didn't even know Dr. Day, did you?

A. Never seen the man in my life.

Q. But didn't you testify on direct examination or cross-examination yesterday that your own doctor, Dr. Hesser [fol. 251] recommended Dr. Day to you as a highly impartial and a very skilled practitioner in heart disease?

A. No, he recommended—Dr. Hesser recommended to the union, the union is the one that told me.

Q. The union told you what, Benny?

A. The union told me that—now, I picked Dr. Hesser myself, I picked him, Dr. Hesser, I picked him for this examination. When I got to Dr. Hesser Dr. Hesser told me, he say, "I am sorry," he say, "I am not a medical doctor," he say, "I am a surgeon doctor. That's what I am. For that reason I can't handle this case, I can't handle this examination," he say, "but I will recommend another doctor."

Q. And who was that?

A. Who the doctor was, I did not know.

Q. You didn't know the doctor?

A. No.

Q. It was Dr. Day, wasn't it?

A. It was Dr. Day, I wind up with Dr. Day.

Q. Now, this Dr. Hesser you are talking about is the same doctor here, H. H. Hesser?

A. That's right.

Q. That wrote a medical report, signed March 24, 1960?

A. That's right.

Q. And he told you that he wasn't qualified to give you a complete medical, didn't he?

A. That's what he told me.

Q. And still you are wanting this jury—

[fol. 252] A. He said he take blood pressure, he say, "I can read blood pressure and so on but," he said, "this other when it comes to heart and this and that and the other, I don't know nothing about it because I am a surgeon doctor."

Q. But still you wanted the jury here to believe that this was a complete medical report.

Mr. Browne: That is objected to as argumentative.

The Court: Sustained.

By Mr. Panethiere:

Q. Now, wasn't that one of the matters that were discussed and one of the problems the union had, was that the company didn't consider these complete medical reports, just like Dr. Hesser told you, wasn't it?

A. I heard them talking it here.

Q. Pardon?

A. I heard it here.

Mr. Browne: I didn't get that answer.

Mr. Panethiere: He heard it here.

By Mr. Panethiere:

Q. Isn't it a fact these were not complete medicals, you just went in and had a doctor take your blood pressure?

A. I don't know, I ain't no doctor.

Q. Well, you know what you told the doctor when you went in there that day, didn't you?

A. The argument was down to Swift's that my blood pressure was too high. That's all it was to it.

Q. All right.

A. That's how come the man wouldn't put me back on [fol. 253] the job, he claimed that my pressure run 300, run so high that he couldn't take it, and I walked right out of his office and go to these people and these people

found it altogether different. That's how come I got so many of them and—

Q. Mr. Owens, let me ask you a question. You would walk in to a doctor and all you would tell them to do was to take your blood pressure, wasn't it? Is that correct?

A. That was all the man told me, that was the argument, he said my pressure was too high to work. What shall I do? He didn't tell me nothing wrong with my eyes or heart or so on, the whole argument was the blood pressure.

Q. Are you testifying that you don't have a heart condition, Mr. Owens?

A. I just stated in my statement I have had high blood pressure, slightly heart trouble, which I was born with, which I don't know nothing but that, that's all, simply because I was born with it.

Q. Now, when you go in to a doctor and ask him to take your blood pressure, would you tell him that you had a congenital heart condition?

A. How would I know?

Q. You just testified that you have, Mr. Owens.

A. Well, they done told me,

Q. I mean these doctors from whom you got these blood [fol. 254] pressure readings in a sentence here that they have examined you to go back to work, did you tell them you had a congenital heart condition?

A. Am I going to tell who?

Q. The doctors?

A. This is his job to find out. I ain't supposed to walk in there and tell this doctor that I got no—if I knew that I wouldn't have to go there.

Q. Are you stating that you don't have a heart condition?

A. No, sir. I told you all the way through that I have had it practically all of my life, I suppose, according, according to the doctor. He told me, "Don't worry about it," he said, "Don't worry about it just because you have had it all your life—"

Mr. Panethiere: I object to this—

Mr. Browne: He is trying to answer you and you are interrupting him.

Mr. Panethiere: I object to the answer as not responsive to the question, Your Honor.

Mr. Browne: You don't want to hear it.

The Court: Proceed.

By Mr. Panethiere:

Q. My question is simply this, you know you have got a heart condition, you have stated, you have testified that you have had it since you were young.

A. I was born with it.

[fol. 255] Q. You were born with it.

A. All my folks died with it.

Q. Now, when you would go in to these doctors to get a blood pressure reading, did you tell them you had a bad heart?

A. Why should I?

Q. Thank you. That's my—that's the exact answer. Thank you.

A. If I am sick I am going to him for help.

Mr. Panethiere: Thank you. I have no further questions.

[fol. 256]

EVIDENCE CLOSED

(Whereupon, the following proceedings were entered of record in chambers, out of the presence and hearing of the jury:)

DEFENDANTS' MOTION FOR DIRECTED VERDICT AT CLOSE
OF EVIDENCE OVERRULED

The Court: Let the record show that the defendants' motion for directed verdict at the close of the entire evidence is by the Court overruled.

RECORD IN CHAMBERS IN RE OBJECTIONS
TO INSTRUCTIONS

The Court has marked as given Instructions No. 1, which is the approved Missouri Instruction 1.01; Nos. 2, 3 and 4, offered by the plaintiff; and Nos. 5, 6, 7, 8, 9 and 10 offered by the defendants;

The Court has also marked as given Instruction No. 11, which is the Missouri Approved Instruction 1.02; and 12, the Forms of Verdict Instruction.

Mr. Panethiere: Just a general objection, Your Honor, to the Instruction No. 2, based on the fact the instruction hypothesizes too many facts not in issue, Your Honor, and hypothesizes evidence not adduced from the witnesses presented by the plaintiff.

[fol. 257] Mr. Browne: Plaintiff respectfully objects and excepts to each and all instructions given by the Court at the request of the defendants and of its own motion, the instructions being 5 through 11.

COURT'S INSTRUCTIONS AND OBJECTIONS THERETO

(Whereupon, the following proceedings were entered of record in the courtroom, in the presence and hearing of the jury:)

(Whereupon, Instructions Nos. 2 through 12 were read to the jury by the Court:)

Instruction 2

The Court instructs the jury that, if you find and believe from the credible evidence submitted for your consideration and from the reasonable inferences directly deducible therefrom, if any, that defendants Vaca, Mooney & Kobett, at the time of filing of the petition in this case, February 13, 1962, were officers and members of the National Brotherhood of Packing House Workers, if so, a labor union, and that the members of said labor union, at said date, were very numerous so that it was then impractical to bring them all before the Court and that naming said defendants

fairly insures adequate representation in Court in this case of all the members of said union and of the rights of said labor union and its members, if so, and that said defendants have been fairly so chosen as such class representatives of said labor union, if so, and if you further [fol. 258] find, that, at all times herein mentioned, said labor union and its members were acting through said defendants, if so, and that in such actions, if any, said defendants were acting within the scope of their employment as such officers, if so, for said labor union and its members, and, if you further so find that during the period from September 1, 1959 to September, 1961 plaintiff was a member of said labor union and an employee of Swift & Co., and that said labor union was designated by contract as the agent, if so, for plaintiff and other members of said union in matters involving grievances of such members against said employer arising from such employment and that any differences, disagreements and local trouble incident to the employment relationship would be handled through the grievance arrangement provided in said master agreement contract, which included five grievance steps, if so, including reference beyond the fourth step by said union, of such grievance to a named arbitrator, if so, for arbitration, and if you further find that from January 8, 1960 on, if so, said employer refused to allow plaintiff to be restored to his job following sick leave, if so, on the asserted claim by such employer that plaintiff was not physically fit to hold said job, if so, and that said claim was false and wrongful in that it was not based on fact, if so, and that, under said master agreement, said employer was required so to restore plaintiff to said job if he was physically fit, if so, and if you so find that at such date, [fol. 259] and thereafter, he was so physically fit, if so, and that said restoration to said job was to displace, if necessary, employees junior in service to plaintiff, receiving the unskilled labor rate, and that said employer refused to displace such junior employees, if any, and to restore plaintiff to his job, if so, or to recall plaintiff to his original

department according to his seniority, when gangs were increased by calling back employees, if so, and refused to pay plaintiff for time lost by improperly refusing so to restore him to such employment, if so, and if you further find that plaintiff requested said employer for such restoration, but was so refused, if so, and that said employer therein breached said master agreement, if so, and that plaintiff had thereby a grievance against and disagreement and difference with employer, by reason of the master agreement, as mentioned herein, if so, and if you further so find that plaintiff thereafter requested said labor union as his agent, if so, as herein mentioned, to carry his difference, disagreement and grievance through all necessary steps, including the fifth step, if so, arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects, and that said labor union thereby, if so, directly caused actual [fol. 260] damage, if any, to plaintiff, then it becomes your duty as jurors to find for the plaintiff, Benjamin Owens, and against the defendants as representatives of said labor union.

Given JDM, J.

Instruction 3

If you find the issues for the plaintiff, Benjamin Owens, and against the defendants, as elsewhere mentioned in these instructions, it then becomes your duty to award the plaintiff such sum, if any, as you may find and believe from the credible evidence submitted for your consideration and from the reasonable inferences directly deducible therefrom, if any, will fairly and justly compensate the plaintiff for any actual damages, if any, by loss of work, if any, you so find and believe he sustained as a direct result of the wrongful actions, if any, of defendants, as elsewhere mentioned in these instructions.

Given JDM, J.

Instruction 4

If you find the issues in favor of plaintiff, as elsewhere mentioned in these instructions, and if you so find that he so sustained actual damages, if any, and if you believe the conduct of defendants was willful, wanton and malicious, if so, then, in addition to any damages to which you find plaintiff entitled under Instruction No. 2 and 3 you may award plaintiff an additional amount as punitive damages, in such sum as you believe will serve to punish defendants and to deter them and others from like conduct.

Given JDM, J.

Instruction No. 5

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you find and believe from the evidence that the union and its representatives acted reasonably and in good faith in the handling and processing of the grievance of the plaintiff.

Given JDM, J.

Instruction No. 6

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you do not believe that defendants did maliciously, arbitrarily, wantonly or wrongly act as submitted to you in Instruction No. 2.

Given JDM, J.

Instruction No. 7

The Court instructs the jury that your verdict must be for the defendants and against the plaintiff if you find [fol. 262] and believe from the evidence that plaintiff did not sustain any damage from the actions of the defendants.

Given JDM, J.

Instruction No. 8

The Court instructs the jury that you are to determine the facts. In this determination, you alone must decide upon the believability of the evidence and its weight and value. In considering the weight and value of the testimony of any witness you may take into consideration the appearance, attitude and behavior of the witness, the interest of the witness in the outcome of this suit, the relation of the witness to any parties to the suit, the inclination of the witness to speak truthfully or not, the probability or improbability of the witness' statements, and all other facts and circumstances in evidence. Thus, you may give the testimony of any witness just such weight and value as you may believe the testimony of such witness is entitled to receive.

Given JDM, J.

Instruction No. 9

The Court instructs you that it is your duty in considering the evidence, deliberating upon and determining the facts in this case to first decide upon the question as to whether, under all the facts, and circumstances, the defendants acted arbitrarily, unreasonably, wantonly or maliciously as charged by the instructions of the plaintiff herein. Until and unless you determine there was such action on the part of the defendants, you should not give consideration to the amount, if any, that plaintiff might be entitled to recover because of any injury sustained as a result of such actions.

It is your duty to come to a conclusion upon all those facts, and the effect of all those facts, the same as you would conscientiously come to a conclusion upon any other set of facts that would come before you in life. There is no technical rule; there is no limitation in courts of justice that prevents you from applying to them (the facts and circumstances in evidence) just the same rules of good common sense, subject always, of course, to the conscien-

tious exercise of that common sense that you would apply to any other subject that came under your consideration and that demanded your judgment. Neither passion, prejudice, or sympathy for or against plaintiff or defendants should influence you in any manner in deciding this case.

Given JDM, J.

Instruction No. 10

The Court instructs the jury that the burden is upon the plaintiff to prove his case by a preponderance or [fol 264] greater weight of the credible evidence, and unless the plaintiff sustains such burden your verdict will be for the defendants.

Given JDM, J.

Instruction No. 11

The Court does not mean to assume as true any fact referred to in these instructions but leaves it to you to determine what the facts are.

Given JDM, J.

Instruction No. 12

You are instructed that nine or more jurors may render a verdict for either party in this case. If all of you agree upon a verdict, your foreman alone will sign it, but if your verdict is rendered by nine, or more, and less than twelve jurors, your verdict must be signed by all of the jurors who agree to it, and in that case you should use the words, "We, the undersigned jurors, find", etc.

Forms of Verdict

If you agree upon a verdict for the plaintiff for actual damages, it may be in the following form:

"We, the jury, find the issues for the plaintiff and do assess his actual damages at _____ Dollars"
(stating the amount)

[fol 265] If you agree upon a verdict for the plaintiff for punitive damages, you may add the following to your verdict:

"And do further find the issues for the plaintiff for punitive damages and do assess his punitive damages at _____ Dollars (stating the amount) in addition to his actual damages."

If you agree upon a verdict for the defendants, it may be in the following form:

"We, the jury, find the issues for the defendants"

These Forms Are Given for Guidance Only and Your Verdict Should Be Written on a Separate Paper and Not on One of These Instructions.

Given JDM, J.

VERDICT.

(Whereupon, counsel for plaintiff and counsel for defendants, respectively, argued the case to the jury; the jury retired to consider their verdict and after due deliberation returned in to court the following verdict:)

"We, the jury, find the issues for the plaintiff and do assess his actual damages at seven thousand dollars. And do further find the issues for the plaintiff for punitive damages and do assess his punitive damages at thirty three hundred dollars in addition to his actual damages.

(Signed) William H. Whittington
Foreman"

[fol 266] JUDGMENT ENTRY

Wherefore, it is ordered and adjudged by the Court that plaintiff have and recover of and from defendants, and each of them, the sum of Seven Thousand Dollars (\$7,000.00) actual damages and the further sum of Three Thousand

Three Hundred Dollars (\$3,300.00) for punitive damages, being a total of Ten Thousand Three Hundred Dollars (\$10,300.00), together with the costs of this cause, and that execution issue therefor.

MOTION OF DEFENDANTS FOR JUDGMENT IN ACCORDANCE WITH THEIR MOTION FOR A DIRECTED VERDICT FILED AT THE CLOSE OF ALL THE EVIDENCE, AND; IN THE ALTERNATIVE, A MOTION FOR A NEW TRIAL

Come now the defendants and, pursuant to the Missouri Rules of Civil Procedure, move the Court to set aside the verdict and judgment entered thereon in this cause and to enter a judgment in favor of the defendants, in accordance with their motion for a directed verdict filed and orally made at the close of all the evidence or, in the alternative, to grant the defendants a new trial, all for the following reasons:

1. Because the verdict is against the law.
2. Because the verdict is against the evidence.
- [fol. 267] 3. Because the verdict is against the law and the evidence and against the greater weight of the credible evidence.
4. Because plaintiff failed to prove, by substantial evidence, a claim or cause of action upon which relief might be granted against these defendants.
5. Because plaintiff failed to prove, by substantial evidence, any wrongful, malicious, wanton or otherwise unlawful action against the plaintiff by these defendants.
6. Because under the pleadings, the law and the evidence, plaintiff was not entitled to relief or to recovery against these defendants.
7. Because the Court erred in overruling and denying defendants' motion for a directed verdict made at the close of all the evidence.

8. Because plaintiff failed to prove that the actions of the defendants here were in any manner wrongful, or arbitrary without just cause or excuse.

9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the State of Missouri.

10. Because, under the pleadings, the law and the evidence, the essence of plaintiff's alleged cause of action arose in the State of Kansas on January 8, 1960, and that plaintiff did not file his petition until February 13, 1962, which was more than two years subsequent to the former date, and that as a consequence thereof plaintiff's alleged claim is barred by the two year statute of limitations of the State of Kansas, under the provisions of Kan. G.S., 1949, 60-306, third clause.

11. Because the Court erred in giving Instruction No. 2 at the request of plaintiff, over the due and timely objections and exceptions of defendants, in that said instruction is erroneous in the following respects and particulars:

(a) Because there was no evidence presented that plaintiff was an employee or a member of the union from the period September 1, 1959, to September 1961;

(b) Because it instructed the jury that the defendants were designated by contract as plaintiff's agent in matters involving grievances of such members against said employer arising from such employment and that any differences, disagreements and local trouble incident to the employment relationship would be handled through the grievance arrangement pro-

[fol. 269] vided in said master agreement contract which included five grievance steps, if so, including reference beyond the fourth step by said union, of such grievance to a named arbitrator, if so, for arbitration . . . and that such constituted a misdirection to the jury because the collective bargaining agreement actually states that a grievance "may" be so referred and that the jury was instructed in such a manner as to lead them to believe that once the fourth step was completed that the fifth step "must" be taken, which is clearly not the case;

(c) Because it assumes that plaintiff was physically fit at the time of the action of the company and the union and that there was no evidence supporting this issue;

(d) Because it assumed facts not in evidence with regard to job displacement to which there was no evidence adduced;

(e) Because it did not require a factual finding as to what manner the plaintiff was allegedly prevented from completing pursuit or completion of his administration remedies, and therefore constituted an abstract submission which was confusing and gave the jury a roving commission;

(f) Because it did not require a factual finding as [fol. 270] to what was "wrongfully", "arbitrarily" and "without just cause or excuse" in the defendants' alleged refusal to carry the grievance through the fifth step, and that such constituted an abstract submission which was confusing, a positive misdirection, a failure to hypothesize the attending circumstances of the facts, and permitted and allowed the jury to make its own determination as to the constituent elements which make up the same and gave the jury a roving commission;

(g) Because there was no evidence presented that defendants in any way "wrongfully", "arbitrarily", and "without just cause or excuse" refused to carry out the grievance referred to in the instructions;

(h) Because it erroneously assumed that the result of an arbitration proceeding would have been the restoration of the job and seniority rights to plaintiff, and that no such assumption could possibly be made without further proof and evidence showing that a hearing was held and such a determination was reached or likely to be reached, and that such an instruction was a positive misdirection, was confusing to the jury, and gave the jury a roving commission;

(i) Because the instruction is inarticulate, confusing, not understandable to the jury, and misleading in that:

[fol. 271] (1) The instruction is poorly and improperly worded and punctuated, so that the various parts of the hypothecation of facts are separated and not tied together, and the jury could have found that the facts were submitted disjunctively rather than conjunctively, and that the jury need have found only certain parts thereof rather than all parts in favor of the plaintiff;

(2) That the instruction predicates defendants' liability in part upon the theory that said restoration to the job was to displace, if necessary, employees junior in service to plaintiff, receiving the unskilled labor rate, and that the employer refused to displace such junior employees, if any, and to restore plaintiff to his job, if so, or to recall plaintiff to his original department according to his seniority, when gangs were increased by calling back employees, if so, and that such is confusing and misleading, constitutes a positive misdirection, especially in view of the fact that there was no evidence whatsoever to support this charge or claim;

(3) That the instruction is confusing and misleading because the greater part of the same is devoted to allegations as to what the employer has allegedly done, and for which there is no evidence to support the same, and that it is confusing and misleading so as to predicate the liability of the defendants herein [fol. 272] for alleged breaches of the collective bargaining agreement by the employer.

12. Because the Court erred in admitting incompetent, irrelevant, immaterial, prejudicial and hearsay evidence offered by plaintiff over the due and timely objection of defendants.

13. Because the verdict of the jury is based on guess, speculation and conjecture and is contrary to the facts in evidence, the applicable law, and the instructions of the Court.

14. Because the verdict of the jury is excessive in amount.

15. Because the verdict of the jury and the award of damages is excessive and is a result of passion, prejudice and sympathy for the plaintiff and against defendants.

16. Because the verdict of the jury is excessive and contrary to the greater weight of the credible evidence as to the nature, character, extent and duration of plaintiff's injuries and damages.

Wherefore, defendants move the court to set aside the verdict and judgment entered thereon and to enter judgment in their favor in accordance with their motion for a directed verdict, or, in the alternative, to grant these defendants a new trial herein.

Filed June 23 1964

[fol. 273] **ORDER—Thursday, August 6, 1964** [872 101]

Now on this day defendants' motion for judgment in accordance with their motion for a directed verdict filed at the close of all the evidence is by the Court sustained for the reason stated in paragraph 9 of said motion, to-wit:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri."

Now on this day defendants' alternative motion for a new trial is by the Court overruled.

**NOTICE OF APPEAL TO THE KANSAS CITY COURT
OF APPEALS—Filed August 12, 1964**

Notice is hereby given that Plaintiff, Benjamin Owens, above named, hereby appeals to the Kansas City Court of Appeals from the Order of the Honorable J. Donald Murphy, Judge of Division 11, of the above Circuit Court, on August 6, 1964, sustaining the Motion of Defendants for judgment in accordance with their Motion for a [fol. 274] Directed Verdict filed at the close of all the evidence.

Dated August 11, 1964.

(s) C. W. Alexander, M.D.

[fol. 278]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 1

[Letterhead of]

DR. JOHN M. GILL

Physician and Surgeon

Office, 1949 North 5th Street, Kansas City, Kansas

7-6-60

This is to certify that I have taken the blood pressure of Benjamin Owens 7-6-60. The reading Systolic 160. Diastolic 100.

/s/ J. M. Gill, M.D.

[Letterhead of]

C. W. ALEXANDER, M.D.

Office, 1514 N. 5th St.

To whom it may concern:

This is to certify that Benjamin Owens has been examined and found able to resume work.

5-19-60

/s/ C. W. Alexander, M.D.

[Letterhead of]

C. W. ALEXANDER, M.D.

Physician & Surgeon

1514 North Fifth Street, Kansas City 1, Kansas

7-8-60

To whom it may concern:

This is to certify that Benjamin Owens has been examined by me.

His blood pressure is 160/100. It is my opinion he is physically able to perform regular work.

/s/ C. W. Alexander, M.D.

[fol. 279]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 2

SWIFT & COMPANY

MASTER AGREEMENT

WITH

NATIONAL BROTHERHOOD
OF PACKINGHOUSE WORKERS

COVERING PERIOD

SEPTEMBER 1, 1959

TO

SEPTEMBER 1, 1961

[fol. 280]

PREAMBLE

This agreement is made between Swift & Company (hereinafter called the Company) and the National Brotherhood of Packinghouse Workers on behalf of itself and the Local Unions set forth in Section II (hereinafter, unless otherwise indicated, the word "Union" refers to both National Brotherhood of Packinghouse Workers, and the Local Unions).

[fol. 281]

SECTION IX

PROMOTIONS AND DEMOTIONS

[fol. 282] *Physical Disability*

(2) If an employee who, in the opinion of the Company, is physically unable to perform his regular assignment or his regular assignments desires to be assigned to a job in his own department paying the same or a lower

rate than the rate of his own regular assignment or assignments, he may file with the foreman of the department a written request that he be assigned to such job. Such request shall be on the form set forth in Exhibit IV attached hereto and made a part hereof. When such job becomes open or vacant for promotion [fol. 283] purposes, such employee shall be assigned to that job, provided he has more department seniority either than the employee to whom the job would normally be given under the provisions of Subparagraph (a) above or than any other employee who has requested assignment to such job under this Subparagraph (b) (2), and further provided that in the opinion of the Company he can perform such job.

[fol. 284]

SECTION XIII

HANDLING OF GRIEVANCES

2. Should differences arise between the Company and the Union or between the Company and employees or between employees of the Company, or should any local trouble of any kind arise in the plant, pertaining to matters involved in this agreement or incident to the employment relation, such differences will be handled through the grievance procedure in the following manner and order; and it is the declared policy of the parties hereto that all such matters shall be settled as promptly as possible.

[fol. 285] *First Step*

Either:

- (a) The aggrieved employee may present his grievance with or without the Union representative to the foreman of the department, or
- (b) In cases where the Union is the aggrieved or the employee refuses to present his grievance, the em-

ploye Union representative or representatives (not exceeding three (3)), with or without the aggrieved, may present the grievance to the foreman of the department involved.

Second Step

If not settled in the first step, then the aggrieved, with or without not to exceed two (2) Union representatives, one (1) of whom shall be an employe of the Company, may present the grievance to the division superintendent or general foreman, whichever is selected by the Company. All grievances presented in this step shall be in writing.

Third Step

If not settled in the second step, then the grievance committee, composed of not more than three (3) Union representatives, two (2) of whom shall be employes, shall meet with the designated committee appointed by the Company, not to exceed three (3) in number, including the plant superintendent or his representative, for the purpose of settling the grievance. The position taken by the Company in this step shall be presented to the Union in writing within five (5) days from the presenting of the grievance in this third step.

[fol. 286] **Fourth Step**

If not settled in the third step, then either party may refer the grievance to the General Superintendent of the Company or his designated representative or representatives and to the national representatives of the Union to assist in settlement of the grievance. Upon request of the National Union the Company will hold the fourth step grievance meeting in the city of the plant involved. Within 10 days after receipt of a written request from the National Union for a Fourth Step grievance meeting, the parties will set a mutually satisfactory date for the holding of such a meeting.

Fifth Step

If not settled in the fourth step, then the National Union may refer the grievance to Gabriel N. Alexander as Arbitrator, whose decision shall be final and binding upon the parties. In making said decision, the Arbitrator shall be bound and governed by the provisions of this contract and restricted to its application to the facts presented to him involved in the grievance.

[fol. 287]

SECTION XIV**SAFETY, HEALTH AND WORKING CONDITIONS**[fol. 288] *Sickness and Accident*

6. (a) (1) When employees are absent from work because of disability due to sickness or noncompensable accident, and when such absences and their continuation are supported by acceptable medical evidence, part wage payments shall be made in accordance with the terms and conditions hereinafter set forth. The Company agrees that if there is an apparent conflict between the employee's physician and the Company as to the physical ability of the employee to perform whatever work the Company might have available for the employee, the physician employed by the Company will communicate with the employee's physician for the purpose of resolving the conflict.

(2) All absences shall be considered as starting with the loss of the first full day on which the employee was scheduled to work, provided that where an employee, because of disability due to sickness or noncompensable accident, is obliged to leave work before he has completed four (4) hours of his scheduled work day, his absence shall be considered as starting with that day.

Service Requirements

(b) (1) Subject to the provisions of the following Subparagraph (b) (2), an employee will qualify for payments under this Paragraph 6 if, at the onset of his disability:

[fol. 289]

a. The Company's employment records show that he has one (1) year's accumulated or one (1) year's continuous service; and

b. He is accumulating service as defined in Paragraph 11, of this Section XIV.

Amount of Payment

(d) The amount of payment shall be a percentage of wages computed in accordance with the following schedule [fol. 290] and on the basis of a forty (40) hour work week at the employee's regular rate of pay or, in the case of employees who have a basic work week either greater or less than forty (40) hours, the percentage of wages computed on the basis of such basic work week at the employee's regular rate of pay:

50% for the first week of disability compensable under this Paragraph 6

55% for second consecutive week of disability compensable under this Paragraph 6

60% for third and fourth consecutive weeks of disability compensable under this Paragraph 6

65% for the fifth and subsequent consecutive weeks of disability compensable under this Paragraph 6

For absences less than a full work week, daily payments for each day of absence that falls within the employee's weekly guarantee period shall be one-fifth ($1/5$) of the weekly payment computed as per the above schedule. No

payment shall be made for absence on the employee's sixth or seventh scheduled work day in such week.

Extent of Payments

(e) The greater of either of the following for any one absence reduced by the payments made for other absences during the twelve (12) months immediately preceding the onset of the current absence:

(1) Two (2) weeks at wages figured in accordance with the preceding paragraph for each year of accumulated service or of continuous service, whichever is the more favorable to the employee, or.

[fol 291]

(2) Thirteen (13) weeks at wages figured in accordance with the preceding paragraph.

[fol 292]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 3

(Letterhead of H. H. Hesser, M. D., Kansas City 1, Kansas)

TO WHOM IT MAY CONCERN:

I have today taken the blood pressure of Mr. Benjamin Owens, 941 Nebraska, Kansas City, Kansas with the following results:

Instrument	Right	Left
Baumanometer:	160/96	162/98
Tycos:	164/90	166/96
Average:	162/93	164/97

Signed on this 24th day of March, 1960.

/s/ H. H. HESSER, M. D.
H. H. Hesser, M. D.

HHH/do

(Letterhead of Bruce P. McDonald, M. D., [fol 292]
Kansas City 27, Mo.)
May 18, 1960

To Whom This May Concern

Re: Mr. Benjamin Owens
941 Nebraska—Kansas City, Ka.

Dear Sir:

This is to verify Mr. Owens was examined and treated
by me this date and that he is released to resume his
regular work as of May 23, 1960.

Very truly yours,

/s/ Bruce P. McDonald
BPM/lmp Bruce P. McDonald, M.D.

[fol 293]
IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 4

Our File No. 18760

January 5, 1961.

Mr. Ernest F. Kobett, Vice President,
National Brotherhood of Packinghouse Workers,
1020 Court Street,
St. Joseph, Missouri.

Dear Mr. Kobett:

Please advise whether the union contemplates any further
action on this matter of Benjamin Owens vs. Swift &
Company.

Please refer to our letter of December 14, 1960.

Yours very truly,

ENNIS, BROWNE & MARTIN,

By:

Allan R. Browne

ARB-1M

[fol. 294]
IN CIRCUIT COURT OF JACKSON COUNTY MISSOURI

PLAINTIFF'S EXHIBIT 5

Our File No. 18750

December 14, 1960.

Mr. Ernest F. Kobett, Vice President,
National Brotherhood of Packinghouse Workers,
1020 Court Street,
St. Joseph, Missouri.

Dear Mr. Kobett:

Mr. Benjamin Owens informs us that you told him that the union was not planning to take any further steps in his matter. Kindly advise if such is the case.

Mr. Owens does not understand why, in the face of the strong medical statements he furnished, the company is not required to put him back to work.

Yours very truly,

ENNIS, BROWNE & MARTIN,

By: _____

Allan B. Browne

ARB-M

[fol. 295]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 6

November 26, 1960

Mr. Allan Browne, Attorney
1212 Mc Gee Street Bldg.
1212 Mc Gee Street
Kansas City 6, Missouri

Dear Sir:

This is in answer to your letter of November 25, 1960,
regarding the Grievance Case of Benjamin Owens.

The case is still open pending further physical examinations of Mr. Owens. After we have received these Medical reports we will have further discussions with the Company.

Sincerely yours,

/s/ **ERNEST F. KOBETT**
Ernest F. Kobett, Vice Pres.
National Brotherhood of
Packinghouse Workers
1020 Court Street
St. Joseph, Missouri

[fol. 296]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 7

Our File No. 18760

November 25, 1960

National Brotherhood of Packinghouse Workers,
1020 Court Street,
St. Joseph, Missouri.

Re: Benjamin Owens vs. Swift & Company

Attention: Mr. Ernest F. Kobett, Vice President

Gentlemen:

Please advise the results of the fourth step of the grievance procedure held on November 16, 1960.

Yours very truly,

ENNIS, BROWNE & MARTIN,

By: _____
Allan R. Browne

ARB-M

[fol. 297] The case is still open pending further physical
In CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 8

Our File No. 18760

November 3, 1960.

Business Agent,
National Brotherhood of Packinghouse Workers,
Suite 213, Flynn Building,
Des Moines, 9, Iowa.

Re: Benjamin Owens

Dear Sir:

Please let us hear from you in response to our letter of
October 24, 1960.

Mr. Owens needs the work very badly, and respectfully
requests that the matter be expedited.

Very truly yours,

ENNIS, BROWNE & MARTIN,

By:

Allan R. Browne

ARB-M

[fol. 298]

[fol. 299]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 91

Our File No. 18760

October 24, 1960.

Business Agent,

National Brotherhood of Packinghouse Workers,

Suite 213, Flynn Building,

Des Moines, Iowa. (9)

Re: Benjamin Owens

Dear Sir:

Our client, Benjamin Owens, is attempting to be reinstated by Swift & Company, here in Kansas City, Missouri.

They refuse to continue his employment, stating that he was not physically qualified. However, they did restore him for two days, and then again refused to keep him, although he has medical statements from five doctors, indicating that he is qualified for the job physically. Swift & Company have stated that the matter is in the fourth step of the grievance procedure. Client would like for the meeting to be held here in this city, as soon as possible, and for our firm to cooperate with you in presentation of the matter.

Will you please advise us when and where the meeting will be?

Yours very truly,

ENNIS, BROWNE & MARTIN

By: _____

Allan R. Browne

ARB-M

Copy to:

Local No. 12,

Independent Packinghouse Workers,

500 Adams Street,

Kansas City, Kansas.

[fol. 299]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 10

Our File No. 18760

September 9, 1960.

Independent Packing House Workers' Union,
Local No. 12,
500 Adams,
Kansas City, Kansas.

Re: Benjamin Owens—KUMC No. 56-9635

Gentlemen:

We represent Mr. Benjamin Owens, a member of your Local, who is trying to be reinstated with Swift & Company in his job.

We need a copy of your agreement with Swift & Company. Is there some way in which you could send us a copy of it? If you will do so, we will be glad to mail it back, if you so desire, after looking at it.

With kind regards, I am,

Very truly yours,

ENNIS, BROWNE & MARTIN,

By: _____

Allan R. Browne

ARB-M

Allan R. Browne

ARB-M

Copy to:

Local No. 12

Independent Packing House Workers

500 Adams Street

Kansas City, Kansas

[fol. 300]

[fol. 301]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

PLAINTIFF'S EXHIBIT 11

(Letterhead of National Brotherhood of Packinghouse
Workers, Des Moines 9, Iowa)

November 10, 1960

#18760

Mr. Allan R. Browne, Attorney
1212 McGee Street
Kansas City, Missouri

Dear Sir:

The grievance case of Benjamin Owens will be heard in
the 4th Step of the Grievance procedure in Kansas City,
Missouri on November 16, 1960.

I will be in Kansas City, Missouri on Tuesday, November
15 and providing there is no objection by the Local #20
officers I would be glad to meet and discuss the case with
you before I meet with Swift & Company.

Sincerely yours,

/s/ ERNEST F. KOBETT

Ernest F. Kobett, Vice Pres.

N. B. P. W.

1020 Court Street

St. Joseph, Missouri

cc Miss Ann Leonard

President Don Mahon

[fol. 300a] Clerk's Certificate to foregoing exhibits (omit-
ted in printing).

[fol. 301]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 17

KANSAS CITY—Aug. 19, 1960

Second step meeting 10-22-1057

Meeting held 8/18/60

Persons present—

Leonard Jamerson—Union representative

Ben Owens—Aggrieved

H. P. Button—Foreman

B. Sharp—Div. Supt.

Company's Position—

In order to make the company's position as clear as possible the medical evidence as shown in the Superintendent's Office was reviewed thoroughly. The position taken by Dr. Morris of K. U. Medical Center was presented which in our opinion left little doubt as to our position in refusing employment to Ben.

The position of Dr. Morris and our plant physician is that Ben Owens was not physically able to perform work in line with his seniority in the Beef Cutting.

Union's Position—

That Ben should be returned to work and be given light work assignment in the Beef Cutting. They presented statements from a number of doctors showing an improvement in blood pressure readings.

No settlement reached in this step.

B. Sharp

[fol. 302]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 18

(Letterhead of Hughes W. Day, M.D., F.C.C.P.,
Kansas City 1, Kansas)

February 6, 1961

Mr. Leonard Jamerson

National Brotherhood of Packinghouse Workers

Local 12

Kansas City, Kansas

Dear Mr. Jamerson:

We examined Mr. Benjamin Owens today at the request of your union for an opinion of his ability to return to work. I will not include in this letter any of his lengthy history for I know you already have this in his file. Our examination was limited in order to keep the expenses low and no x-rays were taken because of this. For your information, they have been made at the University of Kansas School of Medicine.

Mr. Owens has hypertensive heart disease with a blood pressure today of 260/120 but the systolic pressure probably was higher as our office apparatus only registers up to 260 mm of mercury. Urine examination revealed no sugar but a one plus registration of albumin was determined. His non-protein nitrogen (a blood determination for kidney function) was recorded as 50-mgm %. This is above normal but not excessively so. He undoubtedly has a moderate degree of kidney damage seen in all of these types of patients. His electrocardiogram shows some slight damage but nothing extensive as one would expect to see.

As I discussed with you, we believe that Mr. Owens is not able to work and the legal problems of Workman's Compensation would prohibit any company from hiring him. I believe he is entitled to social security disability and I would sign such a paper. This would then entitle him to find some

[fol. 303] light work unassociated with company or corporate laws and insurance.

I am sorry that I cannot give you a better report but Mr. Owens is in a rather serious condition. It is not in our power or knowledge to estimate life and its duration but I believe I gave you this information when I talked with you.

Thank you for letting us see Mr. Owens and if we can help on his social security we will be glad to do so.

Very truly yours,

/s/ HUGHES W. DAY, M.D.
Hughes W. Day, M.D.

[fol. 304]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 19

MEMORANDUM—THIRD STEP CASE #10-22-105

Meeting was held August 31, 1960. Those in attendance were:

For the Union M. Vaca
C. Mooney
L. Jamerson

For the Company S. G. Strand

For reasons stated in other steps in this case, and upon medical reports, the Company's position was that B. Owens could not be rehired or returned to work because of his physical condition and no light work was available in line with seniority.

The Union contended that evidence from some of the doctors who examined B. Owens showed that he was released for regular work.

SGS:th

S. G. STRAND

[fol. 305]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 20

SETTLEMENT AGREEMENT

SWIFT & COMPANY

KANSAS CITY, KANSAS

The Company and the Union agree to complete settlement on the following grievance cases on the following basis:

CASE No.

10-22-57 Union agrees to withdraw.

10-22-87 Company agrees to reimburse C. Pearson, I. Marshall and A. Hill any Standards premium that may be due on the basis of applying temporary Standards adequate to cover their work as performed and as applied against hours considered to be on Standards for the period of time involved in this grievance, similar to the manner in which other Pork Dressing department employees' Standards were figured for same period of time.

10-22-104 Union agrees to withdraw.

The above settlements shall not constitute a precedent or be referred to in the handling of any other grievance or arbitration under any Master or Supplemental Agreement between the Company and the Union.

Executed at Kansas City, Kansas this 16th day of November, 1960.

NATIONAL BROTHERHOOD OF
PACKINGHOUSE WORKERS

SWIFT & COMPANY

/s/ LAWRENCE (Illegible)

/s/ (Illegible)

ERNEST F. ROBERT

Disposition of Other Cases

CASE No.

10-22-89 Hold in 4th Step at Union's request.

10-22-90 Hold in 4th Step at Union's request.

10-22-91 Hold in 4th Step at Union's request.

10-22-105 Hold in 4th Step at Union's request. However, Company and Union agree to promptly and jointly extend every effort possible to assist Benjamin Owens in getting relocated through and with the help of an appropriate federal, state or local vocational rehabilitation center.

10-22-115 Returned to 3rd Step per mutual agreement.

[fol.306]

IN CIRCUIT COURT OF JACKSON COUNTY, MISSOURI

DEFENDANT'S EXHIBIT 21.

K.C.—9/9/60

FOURTH STEP CASE #10-22-105.

FACTS AGREED TO BY UNION AND COMPANY

1. Ben Owens has continuous service from 7/12/46. He was born 7/14/12.
2. Ben Owens has not worked since May 25, 1959; except for three days—January 6, 7 and 8 (28 hours).
3. Ben Owens has been paid S&A from May 25, 1959 through December 18, 1959.
4. Ben Owens has not been paid S&A since December 18, 1959 in accordance with S&A policy.
5. Previous history of days lost due to illness:

1952 9 days
1953 6 "

1954 26 "—High Blood Pressure
 1955 3 "
 1956 72 "—Hurt Leg—& check Pressure—High—
 Leg Swelled up
 1957 13 "
 1958 0 "
 1959 164 "
 1960 to date

6. On June 16, 1960, Dr. Kirkpatrick of Kansas Medical Center reported findings as follows:

Blood pressure 226/ 90—sitting
 212/110—standing
 228/116—sitting
 192/ 98—sitting (after 15 min.)

Working diagnosis: Hypertensive cardiovascular disease.

7. Dr. H. J. Morris on 8/3/60 of Kansas Medical Center recommended only light work, in which he does not lift heavy objects (See copy attached).

FOR THE COMPANY:

/s/ B. E. (Illegible)

FOR THE UNION:

/s/ MANUAL VACA

[fol. 307] **ALLEGED FACTS PRESENTED BY UNION
AND NOT AGREED TO BY MANAGEMENT**

1. Ben Owens was passed by Medical Department for work on January 6.
2. On August 31, Jamerson and Owens talked to Dr. Morris (University of Kansas Medical Center). Statement by Dr. Morris that he (Dr. J. H. Morris) did not know Ben Owens and had never seen him nor had he prescribed any medical direction, nor did he order the use of any medication to Ben Owens direct. Dr. Morris

stated that temperatures 32 to 40 were O.K. but not extremes such as 90 to 95. Dr. Morris stated working with knife was O.K. Full test in letter attached.

3. Ben Owens was examined by reliable doctor and was told he could perform light work. (Copies attached)
4. The Union agrees that Ben Owens can perform light work.

[fol 308] ALLEGED FACTS PRESENTED BY MANAGEMENT AND NOT AGREED TO BY UNION

1. Our Medical Department has not approved his return on the strength of their diagnosis and reports on Owens' physical condition as reported by the University of Kansas Medical Center (See attached).
2. Copy of Physical Demand Report signed by Dr. J. H. Morris (attached) limits activity and working in high humidity areas and marked with temperature extremes.
3. We do not have light work in line with physical limitations as listed in #2 above and in line with his seniority.
4. On January 6, 1960 Ben Owens came to the Medical Department and told the nurse he had been released for work by his doctor. The nurse not being familiar with this case stamped his card as O.K. to return to work. Ben reported to his department foreman and was assigned regular work in the Primal Beef Cutting. It came to the attention of the Swift medical examiner on January 8 that Ben had returned to work on January 6. The medical examiner advised the Superintendent's Office that Ben should not have been permitted to return to work due to his physical condition. Supervision advised Ben on Friday, January 8 that he should not have been permitted to return to work because of his physical condition. Ben was sent home.

[fol 308a] Clerk's Certificate to foregoing exhibits (omitted in printing).

[fol. 309]

IN THE KANSAS CITY COURT OF APPEALS**APRIL SESSION, 1965****No. 24,174****BENJAMIN OWENS, JR., Appellant,****vs.****MANUEL VACA, CALEB MOONEY and ERNEST F. KOBETT, as
OFFICERS OF THE LOCAL AND NATIONAL UNION, Respondents.****Appeal From Jackson County Circuit Court****OPINION—Filed April 5, 1965**

Plaintiff, a discharged employee of Swift & Company, and member of the local and national union, brought a class action against defendants, officers of the local and national union, for actual and punitive damages arising from his alleged wrongful discharge as an employee of Swift, and the failure of the union and its representatives to process his protest through all of the administrative appellate procedures provided for by the Master Employment Agreement. Jury trial resulted in a verdict in plaintiff's favor for \$7,000 actual and \$3,300 punitive damages. The trial court set aside the verdict, entered judgment for defendants and stated as its reason therefor that jurisdiction over the subject matter had been pre-empted by the federal government. Plaintiff has appealed.

Benjamin Owens, Jr., the plaintiff, in January, 1960, when he was permanently and finally discharged, was 47 years of age and had been employed for approximately 16 years by Swift & Company. His duties included the moving of heavy halves and quarters of beef. Mr. Owens testified that

[File endorsement omitted]

he had a congenital heart murmur and had great difficulty in keeping his blood pressure and weight within safe limits. [fol. 310] He said that in May, 1959, he began to "feel bad", took some time off and visited Dr. Saper, the company physician; that he returned to work in September, 1959, the return being approved by Dr. C. W. Alexander, his family physician. Mr. Owens was a man 5 feet and 8 inches in height and when he quit work in May, 1959, weighed 230 pounds. Dr. Saper refused to authorize or approve his return to work, declaring that he was unable to perform labor because of his high blood pressure and cardiac condition. However, Dr. Bruce P. McDonald, a physician selected by plaintiff, reported his blood pressure as 160 over 96, and expressed the opinion that he could resume work.

Apparently Owens worked for some time after September, 1959, and for three days in January, 1960, when the employer (foreman) "fired him". This firing and all later refusals to re-employ plaintiff were solely on the ground that he was physically unable to work. No other reason is suggested. Thereafter the union paid for an examination of plaintiff by a heart specialist of his own choice, Dr. Hughes W. Day. A letter or report by Dr. Day, dated February 6, 1961, was received in evidence. This report recited that plaintiff's blood pressure was 260 over 120, and was probably higher as 260 was the top register for the apparatus used. Dr. Day expressed the definite opinion that Owens was physically unable to return to work. The report described the patient's condition as serious, but refused to estimate his probable life duration. We were informed that plaintiff died prior to the appellate court argument.

Plaintiff never worked for Swift & Company after January, 1960. He had periods of employment elsewhere, but not regularly. Among others, he worked for Shostak Iron & Metal Co. Inc., Jewish Community Center and Spencer Chemical Company.

[fol. 311] Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers in force at the time, entitled "Handling of Grievances" provided for, contemplated and permitted five

administrative appellate steps described as "grievance procedures". Plaintiff protested his being denied employment, asserted he was physically able to work and enlisted the help of the union in contesting the issue. The five administrative steps may be briefly described as follows:

First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department.

Second step: May present the grievance to the Division Superintendent.

Third step: It may be presented to a grievance committee composed of three union and three company representatives.

Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present.

Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement.

It is conceded that plaintiff and the union processed plaintiff's grievance, without success, through the first four steps, but not the fifth step. Plaintiff says the defendants arbitrarily refused and failed to appeal his matter through the fifth step and caused him to lose wages, seniority, and to incur other damages. He charges, too, that one defendant proposed that plaintiff pay him \$300 as expense money preliminary to undertaking the fifth step.

Counsel for plaintiff presented a letter, responsive to his inquiry, from an attorney for the National Labor Relations Board. We quote from it:

[fol. 312] "The fact that an employee has been terminated from his employment may be a violation of the laws we administer, if it can be shown that the employer discriminated against this employee in regard to hire or tenure of employment, . . .

"In addition, if it can be shown that a labor organization caused, or attempted to cause, an employer to

*discriminate against an employee in violation of Section 8(a)(3) for some reason other than the employee's refusal to tender periodic dues and initiation fees, then this would be a separate violation * * *". (Italics ours.)*

As heretofore stated, the jury returned a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. In response to defendants' after-trial motion, the court set aside the verdict and entered judgment for the defendants for the following stated reason:

"9. Because under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that the jurisdiction over the subject matter of this action has been preempted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri".

On appeal plaintiff's only assignment of error is the action of the trial court in setting aside the verdict and entering judgment for defendants. On appeal defendants assert, primarily, that the court was right in entering judgment for defendants and for the assigned reason. Defendants assert, secondarily, that such result was proper [fol. 313] for two additional reasons: First, under the evidence plaintiff "failed to show that defendant union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim". Second, plaintiff filed this suit before the fourth step had been completed and therefore brought it before exhausting his administrative remedies, hence the suit must fail.

We believe the opinion in *Lester Webster et al. v. Midland Electric Coal Corporation et al.* (Ill., Oct. 1963) 193 N.E.2d 212, rules the vital issue involved in our case. Its stature is enhanced by the fact that certiorari was denied (June 8, 1964, 84 S.Ct. 1645) by the Supreme Court of the United States. We shall discuss that opinion.

In the Webster case the suit was by 12 employees of Midland Electric. The petition alleged that the company discharged them in violation of the National Bituminous Coal Wage Agreement. Plaintiffs further asserted that the Union defendants refused to take the necessary steps to redress their grievances and asked that they be required to take such steps and respond in damages, both actual and punitive. This complaint was dismissed and plaintiffs then filed a class action for declaratory judgment. Again the company was charged with violating the National Agreement and the defendant Union with failure to process their grievances, which failure the complaint alleged was done willfully, wantonly, maliciously and arbitrarily. Again the prayer was for both actual and punitive damages. The circuit court dismissed the action and the plaintiffs appealed. The appellate court affirmed the orders and judgment of the trial court and said, l. c. 217, 218:

"Plaintiffs' only complaint against the union defendants is that they have refused to process their complaints against Midland. This the union may ordinarily do. (*Ostrosky v. United Steelworkers of America*, [fol. 314] D.C., 171 F.Supp. 782). Considering the vast number of members of this union, wide discretion must necessarily be placed in the union agents so that as a whole the membership may be best served. (*Ford Motor Company v. Huffman*, 345 U.S. 330, 73 S.Ct. 681).

"In addition, with reference to the union defendants, very recent expressions of the Supreme Court of the United States hold that the National Labor Relations

Board's jurisdiction in matters involving *individual members employment*, pre-empts court jurisdiction. (Local 100 of United Association of Journeymen and Apprentices v. Borden, 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed. 2d 638 and Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union v. Perko, 373 U.S. 701, 83 S.Ct. 1429).

"In the Borden and Perko cases the Supreme Court points out their distinction from the case of International Assn. of Machinists v. Gonzales, 356 U.S. 617, 78 S.Ct. 923. The court said that the Gonzales case applies to strictly internal affairs of a union not involving employment."

The Gonzales case is one of those relied upon by appellants in our case.

In Local 100 of the United Association of Journeymen and Apprentices v. H. N. Borden, 373 U.S. 690, 83 S.Ct. 1423, the action was by a union member against the local and parent unions for wrongful refusal of referral of the member on a construction job. The United States Supreme Court, with Douglas and Clark dissenting, held that the local union's conduct in refusing to refer a union member to a particular job was arguably subject to jurisdiction of the National Labor Relations Board, and the state court did not have jurisdiction of the suit by the union member against the local and international unions for damages. [fol. 315] In Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko, 373 U.S. 701, 83 S.Ct. 1429, a union member brought suit in an Ohio state court against the local union and certain of its officers for damages under the state common law because of defendant's causing the member to be discharged, and preventing his subsequent employment as foreman and superintendent. Judgment for the member was affirmed by the Ohio Court of Appeals and by the Ohio Supreme Court. On certiorari the Supreme Court of

the United States, Mr. Justice Harlan, held that it was at least arguable that the union member was an "employee" within the National Labor Relations Act and that the National Labor Relations Board might well find that the act charged in the complaint was an unfair labor practice by the Union and hence that there was sufficient probability of cognizability by the Board to require the relinquishment of the state's jurisdiction. The judgment for the union member was reversed outright. Again Justices Douglas and Clark dissented.

In the *Gonzales* case, 78 S.Ct. 923, 925, 926 (1957) Mr. Justice Frankfurter, speaking for the Supreme Court, affirmed the state court judgment for a union member suing for a wrongful expulsion from the union. The court said:

"But the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied".

Chief Justice Warren and Mr. Justice Clark dissented, and in their dissenting opinion said:

"By sustaining a state-court damage award against a labor organization for conduct that was subject to an unfair labor practice proceeding under the Federal [fol. 316] Act, this Court sanctions a duplication and conflict of remedies to which I cannot assent".

This court, and the writer of this opinion, in *United Brick & Tile Division of American-Marietta Co. v. Wilkinson, et al.*, 325 S. W. 2d 50, 54, 55, reluctantly concluded there was pre-emption in that case and said:

"In the *Weber* case (75 S.Ct. at page 488) Mr. Justice Frankfurter made this statement: . . . the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds.

Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters (etc.) Union*, supra. But as the opinion in that case recalled, the Labor Management Relations Act "leaves much to the states, though Congress has refrained from telling us how much"."

That the question—"Has the Federal Government pre-empted?" under various sets of facts, presents knotty questions and has produced vague answers and different conclusions is further evidenced by the dissents of the two justices in the *Borden* and *Perko* cases, supra.

We have read the cases cited by appellant and while many of them bear on the issue and some might seem to guide us to a different conclusion, we cannot allow the reasoning in those cases to prevail over the very recent and quite pertinent pronouncements by the Supreme Court of the United States. We believe that the conclusions expressed by the Supreme Court in the *Borden* and *Perko* cases and that court's refusal to grant certiorari in the Illinois case (*Webster v. Midland*, supra), are decisive on the matter before us. In our opinion those are the last and clearest (even though not unanimous) expressions of our [fol. 317] highest court. We therefore hold that the trial court correctly ruled that jurisdiction over the subject matter of this action has been pre-empted by the United States.

The judgment is affirmed.

Fred H. Maughmer, C.

Sperry, C., concurs.

PER CURIAM:

The foregoing opinion of Maughmer, C., is adopted as the opinion of the Court.

Cross, P. J., concurs.

Hunter, J., concurs.

Howard, J., dissents.

[fol. 318]

DISSENTING OPINION—Filed April 5, 1965

I am unable to agree with the result reached in the majority opinion. Assuming the Union officials acted in bad faith, in failing to carry plaintiff's grievance to the fifth step of the grievance procedure, i.e. arbitration, I can not imagine an argument which would show that these facts constituted discrimination by the employer or an unfair labor practice by the Union. Therefore, I can not conclude that the actions herein complained of are either protected or prohibited by Sections 7 or 8 of the National Labor Relations Act (29 U.S.C. Section 157, 158). This view is bolstered by the decisions in the cases of *Humphrey v. Moore*, 375 U.S. 355, 84 Sup. Ct. 363, *Carey v. Westinghouse Electric Corporation*, 375 U.S. 261, 84 Sup. Ct. 401, *Bailer v. Local 470, International Teamsters, Chauffeurs, Warehousemen and Helpers*, 400 Pa. 188, 161 A. 2d 343, and *United Steelworkers of America v. Westinghouse Electric Corporation*, 413 Pa. 358, 196 A. 2d 857.

[fol. 319] While this matter of federal preemption in the field of labor relations remains cloudy, I do not believe that a state court should deny its own jurisdiction where it is unable to point out a logical argument showing that the fact situation is "arguably" within the jurisdiction of the National Labor Relations Board as constituting activity which is protected or prohibited by Sections 7 and 8 of the Act.

For these reasons, I would assert jurisdiction in the state court and reverse the judgment below.

Fred L. Howard, Judge

[File endorsement omitted]

[fol. 320]

IN THE KANSAS CITY COURT OF APPEALS

DECEMBER SESSION 1964

No. 24174

BENJAMIN OWENS, JR., Appellant,

vs.

MANUEL VACA, et al., Respondents.

ORDER OF SUBSTITUTION

Now at this day the Court having considered and fully understood Administrator's Motion for Substitution as appellant, doth consider and adjudge that said motion be and the same is hereby sustained and that N. L. Sipes, Administrator, be and he is hereby substituted as appellant in lieu of Benjamin Owens, Jr., deceased.

State of Missouri, Set.

I, Mary Louise Thomas, Clerk of the Kansas City Court of Appeals, do hereby certify that the above is a full, true and complete copy of the Order of Substitution of N. L. Sipes as Administrator of the Estate of Benjamin Owens, Jr., deceased, Appellant v. Manuel Vaca, et al., Respondents as the same appears of record in my office as of January 18, 1965.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Kansas City, Missouri, this 24th day of June, 1966.

Mary Louise Thomas, Clerk.

(Seal)

[fol. 321]

IN THE KANSAS CITY COURT OF APPEALS

June Session, 1965

Jackson

No. 24174

NILES SIPES, Administrator of Estate of
Benjamin Owens, Deceased, Appellant,

vs.

MANUEL VACA, et al., Respondents.

LETTER OPINION—June 7, 1965

Now at this day the Court having considered and fully understood Appellant's motion for rehearing or in the alternative to transfer to the Supreme Court herein, doth consider and adjudge that the said motion for rehearing be and the same is hereby overruled and transfer to the Supreme Court denied.

The Court of its own motion and in view of the dissenting Opinion filed, this cause is ordered transferred to the Supreme Court for examination of the law because of the general interest and importance of the question involved.

[fol. 322]

IN SUPREME COURT OF MISSOURI

51554

N. L. SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased, Appellant,

vs.

MANUEL VACA et al., Respondents.

Appeal from the Circuit Court of Jackson County

JUDGMENT—Entered December 13, 1965

Now at this day come again the parties aforesaid, by their respective attorneys, and the court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Jackson County rendered, be reversed, annulled and for naught held and esteemed, and that the said appellant be restored to all things which he has lost by reason of the said judgment. It is further considered and adjudged by the court that the said cause be remanded to the said Circuit Court of Jackson County for further proceedings to be had therein, in conformity with the opinion of this court delivered; and that the said appellant recover against the said respondents costs and charges herein expended, and have execution therefor. (Opinion filed.) Transcript—\$213.75; Docket Fee—\$10.00; Total Costs—\$223.75.

[fol. 323]

IN THE SUPREME COURT OF MISSOURI

EN BANC

SEPTEMBER SESSION, 1965

No. 51,554

NILES SIPES, Administrator of Estate of
Benjamin Owens, Jr., Deceased, Appellant,

VS.

MANUEL VACA, et al., Respondents.

Appeal from the Circuit Court of Jackson County

The Honorable J. Donald Murphy, Judge

OPINION—Filed December 13, 1965

This action was instituted by Benjamin Owens, Jr., a discharged employee of Swift & Company and a member of the union, as a class action against the membership of the national and local union of the National Brotherhood of Packing House Workers. Certain officers of said unions were individually named as defendants representative of the class. Owens sought to recover actual and punitive damages resulting from his alleged wrongful discharge and the failure of the union to process his protest through all of the administrative appellate procedures provided for in the Master Agreement. The trial resulted in a verdict for plaintiff in the amount of \$7,000 actual and \$3,300 punitive damages. Upon motion of defendants the trial court set aside the judgment and entered judgment for defendants for the reason that jurisdiction of the subject matter had been preempted by the federal government. Plaintiff ap-

[File endorsement omitted]

pealed to the Kansas City Court of Appeals. He died while the appeal was pending and his administrator was substituted as appellant.

The Kansas City Court of Appeals adopted an opinion affirming the judgment but one of the judges dissented and the court of its own motion transferred the case here. In [fol. 324] that situation we will decide the case "the same as on original appeal." Article V, § 10, Constitution of Missouri 1945, V.A.M.S.

We will continue, for convenience, to hereinafter refer to Benjamin Owens, Jr., as plaintiff. Plaintiff testified that in January 1960, when he was finally discharged by Swift & Company, he was forty-seven years old and had worked sixteen years for Swift; that part of his work was trimming loins, but he also handled heavy halves and quarters of beef; that he had a congenital heart murmur, was troubled with high blood pressure, and had become overweight; that all of his family had had these complaints and had worked hard and lived to a ripe old age; that in May 1959, he had been working long hours, felt bad, and decided to take sick leave for a time and rest up; that at that time he weighed 230 pounds and upon the advice of his physician began to lose weight; that in August his physician, Dr. Alexander, gave him a statement to the effect that he could go back to work and he attempted to do so. However, Dr. Saper, the company's physician, refused to authorize his return to work because of his blood pressure and cardiac condition. In January 1960, plaintiff was examined by Dr. Steinzeig who gave him a statement that he was able to go back to work. He presented this to the company nurse and she authorized his return to work and he worked three days. On the third day, the superintendent apparently learned that plaintiff was back at work and immediately discharged him on the ground that he was not able to work. Plaintiff testified that at that time he felt fine, had reduced his weight to 180 pounds, and was doing the work assigned to him. Plaintiff further testified that during the period from May 1959 to trial time (June, 1964) he had worked

on various temporary jobs but could not get regular employment because he did not dare give Swift, his previous employer, as a reference; that he did hard physical labor for Spencer Chemical Company, Shostak Iron and Metal Company, Guy Campbell, a contractor, Jewish Community [fol. 325] Center, and also did such work as cutting grass, trimming trees and things of that nature; that he was able to earn about \$1,000 a year at that type of seasonal employment.

After being discharged, plaintiff protested his being denied employment, asserted he was physically able to work, and sought the help of the union in contesting the issue and presenting his grievance. Section XIII of the Master Agreement between Swift & Company and the National Brotherhood of Packing House Workers provided for five administrative appellate steps for handling grievance procedures. The five administrative steps may be briefly described as follows: First step: Aggrieved employee may present his grievance "with or without the union representative" to the foreman of the department. Second step: May present the grievance to the division superintendent. Third step: It may be presented to a grievance committee composed of three union and three company representatives. Fourth step: Reference may be made to the general superintendent of the company with a representative of the national union present. Fifth step: The grievance may be referred by the National Union to one Gabriel N. Alexander, who was designated arbitrator under the Agreement. It is conceded that the union processed plaintiff's grievance, without success, throughout the first four steps. Plaintiff cooperated by furnishing the union the statements of a number of physicians indicating that he was able to resume work. Dr. H. H. Hesser, on March 24, 1960, certified that he had taken plaintiff's blood pressure and

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that the reading was — . Dr. Bruce P. McDonald on May

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18, 1960, signed the following certificate: "This is to verify

Mr. Owens was examined and treated by me this date and that he is released to resume his regular work as of May 23, 1960." On July 6, 1960, Dr. John M. Gill signed a statement to the effect that he had taken plaintiff's blood

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pressure that day and the reading was —. On July 8,

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1960, Dr. C. W. Alexander signed the following statement: "This is to certify that Benjamin Owens has been examined

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[fol. 326] by me. His blood pressure is —. It is my

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opinion he is physically able to perform regular work." The company in denying plaintiff's reinstatement did not question the qualifications or integrity of any of plaintiff's physicians but contended that it should have a report indicating a more detailed examination. The company also claimed to have a report from Dr. Saper and Dr. Morris which indicated that plaintiff was not physically able to resume his employment. After the close of the hearing on the fourth step, the union and the company agreed that the grievance be held open at that stage pending further developments and the possible obtention of additional evidence. The union representatives suggested that he have a complete examination by a doctor of his choice and the union would pay for the examination. Plaintiff went to Dr. Hesser who sent him to Dr. H. W. Day and, after examining plaintiff, Dr. Day sent a report to the union

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indicating that plaintiff's blood pressure was — and that

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there was some kidney damage and slight heart damage. He expressed the opinion that plaintiff was not able to work.

Plaintiff testified that he asked Manuel Vaca, president of the local, to carry his grievance to the fifth step but that Vaca stated the union did not have the money to use for that purpose and that he would take it to the fifth step if plaintiff would give him \$300, which, plaintiff stated, he

refused to do. There is evidence that the executive committee of the local union thereafter decided not to take plaintiff's grievance to the fifth step because there was not sufficient favorable medical evidence. At about that time plaintiff employed an attorney who wrote several letters to Ernest Kobett, vice-president of the National Brotherhood, making inquiry as to what future action was contemplated by the union concerning plaintiff's grievance and Kobett did not answer those letters. This suit was filed by plaintiff against representatives of the union on February 13, 1962.

Defendant's evidence consisted of the testimony of four [fol. 327] union officers and representatives. They testified as to the handling of plaintiff's grievance through the first four steps, without success, and as to their reason for refusing to take the fifth step. Manuel Vaca denied that he made any request of plaintiff for \$300, or any other amount, and said that it would have been outrageous for an officer of the union to make such a request. Mr. Kobett testified that he attended the fourth step meeting and that, on May 8, 1964, he attended another meeting at which plaintiff's case was called up for review and since there was no new evidence to present he withdrew the grievance. He also stated that the president and general counsel of the National Union had advised him to withdraw the grievance. He further testified that out of 967 grievances filed during the two-year period preceding August 1963, only one had gone to the fifth step. He admitted that he did not obtain plaintiff's consent to withdraw the grievance, nor did he notify plaintiff that such had been done. In regard to the practice of handling grievances for members, he stated that: " . . . the employee who is a member of the union submits his case to be handled by the union officers. When he gives them that case it is theirs to dispose of as long as they go through the steps up to a point where we either feel we have a good case or we don't have a case. Then the union makes the decision . . . "

Plaintiff at trial time testified that he was feeling good and had been working whenever he could get work; that he had worked for Spencer Chemical Company until two weeks before trial, handling bags of fertilizer weighing 80 pounds for as much as twelve hours a day; that he had been laid off because of lack of work.

As we have indicated, the trial court sustained the defendants' motion for judgment for the reason that "under the pleadings, the law and the evidence, the conduct of the defendants herein was arguably conduct, which is protected by the Labor Management Relations or National Labor Relations Act, 29 U.S.C., Section 151 et seq., so that [fol. 328] the jurisdiction over the subject matter of this action has been pre-empted by the passage of said Act by the Congress of the United States, and that exclusive primary jurisdiction over this cause is in the National Labor Relations Board, and not in the courts of the state of Missouri." Upon this appeal the sole contention briefed by appellant is that the trial court erred in setting aside the verdict and entering judgment for the defendants.

The question presented is not an easy one to decide. The difficulties encountered were recognized in the case of *Weber v. Anheuser-Busch*, 348 U.S. 468, 480-481, 75 S. Ct. 480, 99 L. ed. 546, wherein the court stated: "By the Taft-Hartley Act, Congress did not exhaust the full sweep of legislative power over industrial relations given by the Commerce Clause. Congress formulated a code whereby it outlawed some aspects of labor activities and left others free for the operation of economic forces. As to both categories, the areas that have been pre-empted by federal authority and thereby withdrawn from state power are not susceptible of delimitation by fixed metes and bounds. Obvious conflict, actual or potential, leads to easy judicial exclusion of state action. Such was the situation in *Garner v. Teamsters, C. & H. Local Union* [346 U.S. 485, 74 S.Ct. 161, 98 L. ed. 228], supra. But as the opinion in that case recalled, the Labor Management Relations Act leaves much to the states, though Congress has refrained from telling

us how much.' 346 U.S., at 488. This penumbral area can be rendered progressively clear only by the course of litigation We have considered many cases cited in the briefs but have concluded that our decision must rest, primarily, upon a correct interpretation of four cases decided by the Supreme Court of the United States. The two cases supporting the view that the state court had jurisdiction are *International Association of Machinists et al. v. Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L. ed. 2d 1018, and *International Union, United Automobile, Aircraft and Agricultural Implement Workers of America (UAW-CIO) [fol. 329] et al. v. Russell*, 356 U.S. 634, 78 S.Ct. 932, 2 L. ed. 2d 1030. Two cases which tend to support a contrary view are *Local 100, United Association of Journeymen & Apprentices v. Borden*, 373 U.S. 690, 83 S.Ct. 1423, 10 L. ed. 2d 638, and *Local No. 207, International Association of Bridge, Structural and Ornamental Iron Workers Union et al. v. Perko*, 373 U.S. 701, 83 S.Ct. 1429, 10 L. ed. 2d 646.

In *Gonzales*, the plaintiff, claiming to have been wrongfully expelled from membership, brought suit against the union and obtained a judgment ordering reinstatement and awarding him damages for loss of wages as well as for physical and mental suffering. The Supreme Court held that § 158 of 29 U.S.C.A. did not exclude the exercise of jurisdiction by the state court. In so ruling the court stated that: " . . . the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied. . . . The National Labor Relations Board could not have given respondent the relief that California gave him according to its local law of contracts and damages. Although, if the unions' conduct constituted an unfair labor practice, the Board might possibly have been empowered to award back pay, in no event could it mulct in damages for mental or physical suffering. And the possibility of partial relief from the Board does not, in such a case as is here pre-

sented, deprive a party of available state remedies for all damages suffered." 356 U.S. 620, 621.

In *Russell*, the plaintiff, a nonunion employee, brought a common-law tort action in a state court against a labor union and recovered a judgment for compensatory and punitive damages for malicious interference with his occupation by mass picketing and threats of violence during a strike. Upon review by certiorari the Supreme Court held that Congress had not deprived the victim of tortious conduct of the type there involved of his right of action for all damages suffered. In its opinion the court said: "We [fol. 330] conclude that an employee's right to recover, in the state courts, all damages caused him by this kind of tortious conduct cannot fairly be said to be pre-empted without a clearer declaration of congressional policy than we find here. Of course, *Russell* could not collect duplicate compensation for lost pay from the state courts and the Board.

"Punitive damages constitute a well-settled form of relief under the law of Alabama when there is a willful and malicious wrong. *Penney v. Warren*, 217 Ala. 120, 115 So. 16. To the extent that such relief is penal in its nature, it is all the more clearly not granted to the Board by the Federal Acts. *Republic Steel Corp. v. Labor Board*, 311 U.S. 7, 10-12. The power to impose punitive sanctions is within the jurisdiction of the state courts but not within that of the Board * * *." 356 U.S. 646.

In *Borden*, as stated in the syllabus, "Respondent, a member of a local plumbers' union in Shreveport, La., arrived in Dallas, Tex., looking for a job with a construction company on a particular bank construction project there. Although the foreman of the construction company wanted him, he was unable to get the job, because the company's hiring was done through union referral, and the business agent of petitioner, the local plumbers' union in Dallas, refused to refer respondent. Respondent sued petitioner in a Texas State Court, seeking damages for such refusal and alleging that petitioner's actions constituted a willful,

malicious and discriminatory interference with his right to contract and to pursue a lawful occupation; that petitioner had breached a promise, implicit in the union membership arrangement, not to discriminate unfairly or to deny any member the right to work; and that it had violated certain state statutes. Petitioner challenged the State Court's jurisdiction." 373 U.S. 690, 691. The court held that the conduct of the union was arguably protected by § 7 or prohibited by § 8 of the National Labor Relations Act and hence the state court was precluded from exercising jurisdiction. The court said the case was to be distinguished from *Gonzales* in that *Gonzales* "... turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do directly with matters of employment, and that the principal relief sought was restoration of union membership rights. In this posture, collateral relief in the form of consequential damages for loss of employment was not to be denied. ... The suit involved here was focused principally, if not entirely, on the union's actions with respect to Borden's efforts to obtain employment. No specific equitable relief was sought directed to Borden's status in the union, and thus there was no state remedy to 'fill out' by permitting the award of consequential damages." 373 U.S. 697.

The *Perko* case involved a plaintiff who was a member of the union. He sued the union and certain of its officers to recover damages resulting from the acts of defendants in demanding that he be discharged from his duties as a superintendent or foreman. He was discharged and alleged that defendants prevented him from obtaining work as a foreman by representing that his foreman's rights had been suspended. Plaintiff obtained a substantial judgment in the state court and the Supreme Court granted certiorari. In holding that the state court had no jurisdiction the court stated that: "As in *Borden*, the crux of the action here concerned alleged interference with the plaintiff's existing

or prospective employment relations and was not directed to internal union matters. Indeed the state court itself observed that 'Plaintiff is not attempting to secure any redress for loss of rights as a member of the union.' *Supra*, p. 703. Thus there was no permissible state remedy to which the award of consequential damages for loss of earnings might be subordinated." 373 U.S. 705.

A state court case supporting appellant's contention is *Bailer v. Local 470, International Teamsters, etc.*, 400 Pa. [fol. 332] 188, 161 A. 2d 343, 346. Therein the following appears: "Appellant avers in his first claim that the appellee Local breached its fiduciary duty to him in not representing him in good faith before the arbitrator. Our jurisdiction over this claim is clearly not ousted by the Taft-Hartley Act, since appellant is suing solely to enforce his rights as a union member and not to enforce rights of employment * * *." On the other hand, a state court case tending to support the position of defendants is *Webster v. Midland Electric Coal Corp.*, 43 Ill. App. 2d 359, 193 N.E. 2d 212[7].

Upon casual consideration it may appear that *Borden* and *Perko* conflict with *Gonzales*. However, it certainly must be said that those cases do not overrule *Gonzales*, by implication or otherwise, because both of them refer to and distinguish that case. We think it is clear that *Borden* and *Perko* are distinguishable, upon the facts, from the case before us. In *Borden* the union agent willfully refused to let *Borden* work even though the prospective employer requested that he be referred for a job. *Perko* lost his job as a foreman because of a dispute with the union as a result of which the union informed *Perko's* employer that the men would no longer take orders from him.

If, by subsequent opinions, the court has restricted *Gonzales* and *Russell* to the precise factual situations there involved (expulsion from the union and interference with employment by mass picketing and threats), then those cases would not apply in a determination of the case at bar. However, our reading of the various cases does not

convince us that such a restricted application of those cases is warranted.

We have concluded that the "Labor Management Relations Act," 29 U.S.C.A., §§ 157 and 158, has not pre-empted the jurisdiction of the Missouri courts in the case before us. While we think the facts in this case more strongly support state jurisdiction than the facts in *Gonzales*, we nevertheless are of the opinion that the *Gonzales* case is [fol. 333] decisive of the issue before us.

We do not think that it could reasonably be argued that the conduct of defendants constituted an unfair labor practice in violation of § 158, *supra*. Defendants contend that such was an unfair labor practice in that it violated § 158(b) and (b)(2) which read, in part, as follows: "It shall be an unfair labor practice for a labor organization or its agents— . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section" Sections (a) and (a)(3) referred to in the foregoing provide that: "(a) It shall be an unfair labor practice for an employer— . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization" It appears obvious to us that those provisions do not apply to the factual situation before us. Here the union had nothing to do with Owens being discharged. It is evident that that idea originated with the employer. There is no evidence that the union desired that some other particular member of the union obtain the job from which Owens had been discharged. Nor is there any evidence to indicate that the union representatives took any affirmative action to prevent the re-employment of Owens. He was not expelled or suspended from union membership. The crux of plaintiff's claim was that he was wrongfully discharged by his employer and defendants wrongfully failed and refused to process his claim for reinstatement through the "fifth step" and thus he was prevented from being restored to his job. Discrimination was neither alleged nor submitted to the jury as an element of the claim.

Some of the cases have said that Gonzales involved an internal union matter not directly concerning a matter of employment. Such statements may be technically correct but as a practical matter the real complaint of Gonzales was his inability to obtain employment because of his expulsion from union membership. We see no difference in [fol. 334] that situation and the situation in the instant case. We are dealing with an internal union matter in that Owens complained of the refusal of the union to fully process his grievance. He, like Gonzales, hoped that as a result of proper union action he would be restored to his employment. If Gonzales involved a purely internal union matter then the case at bar involves a purely internal union matter. The Gonzales case is clearly applicable here and is ample authority for our conclusion that jurisdiction of the subject matter of this case has not been pre-empted by the Labor Management Relations Act, 29 U.S.C.A., §§ 141, et seq.

Defendants have briefed two alternative contentions which they say support the action of the trial court in entering judgment for them even though we should hold (as we have) that jurisdiction of the subject matter of this claim was not pre-empted by the Labor Management Relations Act, supra. The first of those contentions is: " . . . that under the facts and evidence adduced plaintiff has failed to show that the defendant Union was guilty of bad faith or discriminatory motive in refusing to further handle or process plaintiff's grievance since there was not adequate medical evidence available to show that plaintiff had a meritorious claim." In considering that point we will view the evidence in the light most favorable to appellant. The essential issue submitted to the jury was whether the union, as plaintiff's agent: " . . . arbitrarily, if so, and without just cause or excuse, if so (and thus with legal malice, if so), refused to carry said grievance, difference and disagreement, if any, through the fifth step, if so, and thus prevented, if so, plaintiff from completing pursuit of his administrative remedies in the above respects"

We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were [fol. 335] content to rely upon written statements. Three physicians certified that plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly rule this point adversely to defendants.

The other alternative contention is that the judgment for defendants should be affirmed because " * * * it was shown that the fourth step of the grievance was held open and not completed until almost the time of the trial of this cause of action and after the filing of the same and that, as a consequence thereof, the plaintiff has failed to exhaust his administrative and contractual remedies." That point is without merit. Defendants' evidence showed that they were in complete control of the management of plaintiff's grievance. One of the defendants failed to answer several letters he received from plaintiff's attorney inquiring as to what future action was contemplated concerning the grievance. Finally, without plaintiff's consent, the defendants withdrew it. If plaintiff failed to exhaust his administrative remedies it was entirely the fault of defendants. It is elementary that defendants will not be heard to interpose as a defense to this claim a condition which resulted solely from their action or inaction.

It will be noted that the amount of punitive damages specified in the verdict was \$3,300. Reference to the petition discloses that the prayer for punitive damages was in the amount of \$3,000. Before the judgment is re-entered, as hereinafter directed, plaintiff should be required to file a remittitur in the amount of \$300.

[fol. 336] The judgment is reversed and cause remanded with directions to reinstate the verdict and judgment for plaintiff.

Lawrence Holman, Judge.

All concur.

[fol. 337]

IN SUPREME COURT OF MISSOURI

51554

N. L. SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased, Appellant,

vs.

MANUEL VACA et al., Respondents.

RESPONDENTS' MOTION FOR REHEARING OVERRULED

—January 10, 1966

Now at this day, on consideration of respondents' motion for rehearing in the above-entitled cause, it is ordered by the Court that said motion be, and the same is, hereby overruled.

[fol. 338] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 339]

SUPREME COURT OF THE UNITED STATES

No., October Term, 1965

MANUEL VACA, CALEB MOONEY and ERNEST F. KOBETT,
Petitioners,

VS.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased.

ORDER EXTENDING TIME TO FILE PETITION FOR
WRIT OF CERTIORARI—April 7, 1966

Upon Consideration of the application of counsel for
petitioner(s),

It Is Ordered that the time for filing a petition for writ
of certiorari in the above-entitled cause be, and the same
is hereby, extending to and including May 2, 1966.

Byron R. White, Associate Justice of the Supreme
Court of the United States.

Dated this 7th day of April, 1966.

SUPREME COURT OF THE UNITED STATES

No. 1267, October Term, 1965

MANUEL VACA, et al., Petitioners,

v.

NILES SIPES, Administrator of the Estate of
Benjamin Owens, Jr., Deceased.

ORDER ALLOWING CERTIORARI—June 6, 1966

The petition herein for a writ of certiorari to the Supreme Court of the State of Missouri is granted, and the case is placed on the summary calendar. The Solicitor General is invited to file a brief expressing the views of the United States.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.